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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

C. MERLE GILE
2200 N. Classen Boulevard
2000 Citizen's Tower
Oklahoma City, OK 73106

JAMES A. ROLFE
2821 Routh Street
Dallas, TX 75201

LYNN PRINGLE
PRINGLE & PRINGLE
4101 N. Classen Boulevard
Oklahoma City, OK 73118

JACK L. NEVILLE, JR.
BERNARD J. ROTHBAUM *
LINN & NEVILLE, P.C.
1200 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102
(405) 239-6781
Counsel for Petitioners

*Counsel of Record

December 17, 1996

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 95-6030

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

JOHN HUDSON; LARRY BARESEL; JACK B. RACKLEY,
Defendants-Appellees.

Aug. 8, 1996

Before TACHA, LOGAN and REAVLEY,* Circuit Judges.

REAVLEY, Circuit Judge.

The United States appeals the dismissal on double jeopardy grounds of its criminal indictment against John Hudson, Larry Baresel, and Jack B. Rackley ("defendants" or "appellees"). Prior to being indicted the defendants had been fined by the Office of the Comptroller of the Currency ("OCC"). The defendants moved to dismiss the indictment for violating the "multiple punishments" prong of the Double Jeopardy Clause.[1] The district court granted

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* The Honorable Thomas M. Reavley, United States Court of Appeals, Fifth Circuit, sitting by designation.

[1] The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be twice put in jeopardy of life or limb. . . ." U.S. Const. Amend. V. The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same of-

the motion, concluding that the OCC fines were punishment for the same offenses charged in the indictment. Because we find that the fines were not punitive, we reverse and remand for further proceedings.

PROCEDURAL HISTORY

In 1989, the OCC issued civil penalties against the appellees for alleged banking violations.[2] The OCC maintained that the violations caused approximately $900,000 in losses to the Federal Deposit Insurance Corporation, and ordered Hudson to pay $100,000 and Rackley and Baresel to pay $50,000 each. The OCC also issued orders ("prohibition orders") which in essence sought to prohibit appellees from all banking activities.

As a resut of the then pending administrative actions against them, the appellees and the OCC entered into agreements ("consent orders") in which Hudson consented to pay $16,600 and Rackley and Baresel consented to pay $15,000 each. The appellees also agreed not to participate in most, if not all, banking activities without prior authorization from the government. In addition, each consent order contained a provision ("waiver provision") stating that nothing in the consent order constituted a waiver of any right the government had to bring other actions against the appellee. Hudson's and Baresel's consent orders each contained a provision stating that the order "does not constitute an admission" by either "to any of the charges contained" in the OCC's notices.

After the government indicted the defendants for the same transactions upon which the OCC sanctions were

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fense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) the imposition of multiple punishments for the same offense. *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989).

[2] The civil penalties were imposed pursuant to 12 U.S.C. §§ 93(b) and 504 for alleged violations of 12 U.S.C. §§ 84 and 375b, and of 12 C.F.R. §§ 31.2(b) and 215.4(b).

based, the defendants moved to dismiss the indictment. The district court initially denied the motion, ruling that the waiver provision was a valid waiver of the defendants' double jeopardy claim, and that the fines and nonparticipation sanction were solely remedial. The defendants appealed, and a prior panel of this court reversed in part, affirmed in part, and remanded for further proceedings. *See United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994) ("*Hudson I*").

Hudson I first determined that the waiver provision did not constitute a waiver of the defendants' double jeopardy rights. *Id.* at 539. The court then affirmed that the prohibition order was remedial and therefore did not violate the Double Jeopardy Clause. *Id.* at 540-42. The court concluded, however, that there was insufficient evidence in the record to sunpport the district court's determination that the money sanctions were solely remedial, pointing out that the district court made no findings regarding actual losses the government incurred. *Id.* at 543. The court therefore vacated the district court's decision on the money sanctions remanded for further proceedings.

On remand the district court conducted an evidentiary hearing and found that the government's proven costs were the $72,000 the OCC spent pursuing the defendants, but concluded that the OCC monetary sanctions against the defendants were not solely remedial. The court found that the fines were imposed for the same offenses charged in the indictment, and held that the indictment violated the Double Jeopardy Clause.

ANALYSIS

The only issue we need to address on this appeal is whether the district court erred in determining that the monetary sanctions were not solely remedial.[3] We review

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[3] Because we reverse the case on this issue, we do not address whether the monetary sanctions were imposed for the same offenses charged in the indictment.

the district court's determination for abuse of discretion. *United States v. Halper*, 490 U.S. 435, 450, 109 S.Ct. 1892, 1902, 104 L.Ed.2d 487 (1989); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir.1990).

Hudson I acknowledged that the case is controlled by *Halper*, which considered when a civil sanction may be considered punishment for double jeopardy purposes.[4] Under the objective test outlined in *Halper*, a particular sanction is not punishment when it bears a rational relation to the goal of compensating the government for its loss. *Halper*, 490 U.S. at 449-51, 109 S.Ct. at 1902-03 The defendant in *Halper* had overbilled the government $585 by submitting 65 false claims. He was convicted in a criminal case and received a $5,000 fine. The government then brought a civil action under the False Claims Act, seeking civil penalties of over $130,000, based on the Act's provision for a civil penalty of $2000 per false claim submitted. The Court held that the fine was grossly disproportionate to the damage caused, and was therefore a punishment. The Court emphasized that its ruling was "a rule for the rare case," *id.* at 449, 109 S.Ct. at 1902, where the civil penalty is "exponentially greater than the amount of the fraud," *id.* at 445, 109 S.Ct. at 1900, and is "so extreme and so divorced from the Government's damages," *id.* at 442, 109 S.Ct. at 1898, that it could only be characterized as punishment under the Double Jeopardy Clause.

In the case at bar there was no gross disproportionality between the total fines imposed, $44,000, and the proven damages to the government, $72,000.

[4] The recent Supreme Court case of *United States v. Ursery*, —— U.S. ——, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996), reaffirms that *Halper* controls the case at bar. In *Ursery*, the Supreme Court distinguished between cases involving civil fines and sanctions, which may constitute punishment under *Halper*, and in rem civil forfeitures, which are neither punishment nor criminal for double jeopardy purposes. *Id.* at ——. 116 S.Ct. at 2141-44. Because the case at bar involves civil fines and sanctions. *Halper* controls.

In *United States v. Bizzell*, 921 F.2d 263 (10th Cir. 1990), we held that a fine is not punishment unless it is overwhelmingly disproportionate to the government's damages. *Id.* at 267. In *Bizzell*, the Department of Housing and Urban Development ("HUD") filed administrative complaints against Charles and John Bizzell. The Bizzells entered into settlement agreements with HUD. Both agreements prohibited the Bizzells from participating in HUD programs for a short period,[5] and John Bizzell agreed to pay a $30,000 sanction. When the government subsequently indicted the Bizzells for the same transactions set forth in the HUD administrative complaint, both defendants moved to dismiss the indictment on double jeopardy grounds. The district court ruled that the prohibitions were remedial, but concluded that the monetary sanction was a punishment because it bore no relation to a remedial goal. *Id.* at 265. This court agreed that the prohibitions were remedial, but concluded that the monetary sanction was a punishment. *Id.* at 266.

The *Bizzell* court read *Halper* to state that "a civil remedy enacted by the government does not rise to the level of proscribed 'punishment unless 'in a particular case a civil penalty . . . may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment.' " *Id.* (quoting *Halper*, 490 U.S. at 442, 109 S.Ct. at 1898); *see also Burke v. Board of Gov. of Federal Reserve System*, 940 F.2d 1360, 1367 (10th Cir.1991) ("[M]ultiple punishments exist for purposes of double jeopardy where 'a civil penalty [is] so extreme and so divorced from the Government's damages and expenses as to constitute punishment.' " (quoting *Halper*, 490 U.S. at 442, 109 S.Ct. at 1898)), *cert. denied* 504 U.S. 916, 112 S.Ct. 1957, 118 L.Ed.2d 559 (1992). In *Bizzell* we noted that under *Halper* the question is "whether the civil remedies can be fairly described as remedial," *Id.* at 267,

[5] John Bizzell was excluded for two years conditioned upon the payment of his fine and Charles for 18 months. *Id.* at 265

and then applied this objective test to the facts before it. The court held that the district court had abused its discretion by holding that the $30,000 sanction was punitive because "[t]he record simply does not suggest that the amount John Bizzell agreed to pay HUD was 'overwhelmingly disproportionate to the damages he caused.'" *Id.* at 267. The court found that the sanction served a remedial goal because "the government's losses attributable to John Bizzell far exceeded $30,000." *Id.*

Following that language in *Bizzell*, the record in the case at bar "simply does not suggest that the amount [the defendants] agreed to pay [the OCC] was 'overwhelmingly disproportionate to the damages [they] caused.'" And the sanctions can "fairly be characterized as remedial" because "the government's losses attributable to [the defendants] far exceeded [the amount of the fines imposed]."

If subjective intent of the administrative agency were determinative, we would have to conclude that the prohibition order, held to be remedial in *Hudson I*, was punishment, for undoubtedly the OCC hoped to deter future violations with that penalty also. It is worth stressing that the *Halper* test "constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to lie behind a given judicial proceeding." *Halper*, 490 U.S. at 453, 109 S.Ct. at 1904 (Kennedy, J., concurring); *cf. Hicks v. Feiock*, 485 U.S. 624, 635, 108 S.Ct. 1423, 1431, 99 L.Ed.2d 721 (1988).

Cases in two other circuits are closely on point. In *United States v. Furlett*, 974 F.2d 839 (7th Cir.1992), an administrative law judge sanctioned two futures traders for various trading transgressions, stating "it is imperative that sanctions be levied against respondents to deter further illegal activity and to protect public customers for the type of insidious conduct described in this case." *Id.* at 841 (quoting *United States v. Furlett*, 781 F.Supp.

536, 538 (N.D.Ill.1991) (quoting the ALJ opinion)). In opposing the defendants' motion on double jeopardy grounds, the government introduced an affidavit delineating the expenses it had incurred in pursuing the traders. The district court concluded that the fines were remedial for two reasons: they were a form of disgorgement, and they were not overwhelmingly disproportionate to the government's costs incurred in pursuing the traders. *Furlett*, 974 F.2d at 842.

On appeal, the traders argued that the district court erred in upholding the ALJ's sanctions because the ALJ had not, in fact, considered the government's loss when he imposed the fine. *Id.* at 843. The appellate court rejected this argument, noting that *Halper* called for an objective inquiry. *Id.* at 844. The court reasoned that merely because the ALJ did not consider the government's loss when imposing the fine does not imply that the fine is not related to the government's loss. *Id.* at 843-44. The court held that the fines were remedial largely because they were not disproportionate to the damages caused to the government. *Id.* at 843.

In *United States v. WRW Corp.*, 986 F.2d 138 (6th Cir.1993), WRW corporation was assessed civil penalties of $90,350 for violations of safety standards under the Federal Mine Safety and Health Act.[6] The officers and directors of WRW were later indicted and convicted for these same violations, and they served prison sentences and paid criminal fines. After the United States brought an action to collect the civil fines that had been assessed against the corporation, the defendants moved to dismiss on double jeopardy grounds. Relying on *Halper*, they argued that the imposition of civil penalties promoted the aims of retribution and deterence, given the various factors

[6] Federal Mine Safety and Health Act of 1977, §§ 2 et seq., 110(a), (d), 30 U.S.C. §§ 801 et seq., 820(a), (d).

used to determine the amount of the civil penalty.[7] The court stated that these factors may as readily be ascribed to remedial as to punitive purposes, *id.* at 141-42, and emphasized that "the fact that the Government's expenses may not have been considered when assessing the amount of the penalty does not alter the objective conclusion by the trial court that the penalty assessed is rationally related to the goal of making the Government whole." *Id.* at 142 (citing *Furlett*, 974 F.2d at 843-44). The court then held that the fines were rationally related to the goal of making the government whole in large part because the civil fines were not excessive in relation to the United States' expenses incurred in the investigation and prosecution of the defendants' violations. *Id.* at 142.

CONCLUSION

Under *Bizzell* and *Halper*, we hold that it was an abuse of discretion for the district court to rule that the monetary sanctions were not solely remedial. The sanctions were rationally related to the government's damages. We therefore reverse the order granting the defendant's motion to dismiss and remand for further proceedings.

REVERSED AND REMANDED.

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[7] These factors included: the operator's history of previous violations, the size of the penalty versus size of the operator's business, whether the operator was negligent, the effect of the penalty on the operator's ability to remain in business, and the good faith of the operator to achieve rapid compliance after notification of a violation. *Id.* at 141, n. 1 (citing 30 U.S.C. § 820(i)).

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. OKLAHOMA

No. CR-92-152-T

UNITED STATES OF AMERICA,
Plaintiff,

v.

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants.

Dec. 16, 1994

ORDER

RALPH G. THOMPSON, District Judge.

Before the court is the motion of defendants John Hudson, Larry Baresel and Jack Butler Rackley to dismiss the August 1992 indictment for criminal law violations of 18 U.S.C. §§ 2, 371, 656 and 1005. Defendants were alleged to have violated those statutes by mismanagement and illegal operation of several banks. These violations were based on the same lending transactions which were the subject of prior administrative sanctions imposed against defendants by the Office of the Comptroller of the Currency ("OCC"). The OCC action culminated in the execution by defendants of a Stipulation and Consent Order ("Consent Order"), which, *inter alia*, prohibited defendants from future participation in banking activities and imposed monetary fines for alleged federal law violations.

Defendants moved to dismiss the indictment on the grounds that it constitutes punishment for the same con-

duct which was the subject of the Consent Order and there violated the double jeopardy clause. This court denied that motion, finding that the Consent Order contained a knowing and voluntary waiver of the defendants' double jeopardy claim. The court further found that, in any event, the sanction prohibiting participation in banking activities and the fines were not punitive measures encompassed by the double jeopardy clause.

Defendants appealed that decision to the Tenth Circuit Court of Appeals, which affirmed in part and reversed and remanded for further action. *United States v. Hudson,* 14 F.3d 536 (10th Cir.1994). The Tenth Circuit reversed the determination that the Consent Order included a waiver, but affirmed the decision that the prohibition against future participation in banking activities was not punitive. 14 F.3d at 539, 541. The Tenth Circuit reversed the decision that monetary sanctions were not punitive and, remanded the action for further consideration of the effect of the monetary fines. *Id.* at 542-43. The court has held an evidentiary hearing and the parties have submitted additional brief on the issues presented. The question before the court on remand is whether the Consent Order monetary sanctions and the indictment address the same conduct by defendants and, if so, whether the monetary sanctions imposed by the OCC are remedial or punitive.

Double jeopardy rights arise where an individual is punished twice for the same conduct or offense. The test to be applied to determine whether there are two offenses or only one is whether each provision "requires proof of an additional fact which the other does not." *Burke v. Board,* 940 F.2d 1360, 1367 (10th Cir.1991), *citing Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). If the same offense results in criminal punishment and civil money penalties,

multiple punishments exist for purposes of double jeopardy where "a civil penalty [is] so extreme and so divorced from the government's damages and expenses as to constitute punishment." *Burke,* 940 F.2d at 1367, *citing United States v. Halper,* 490 U.S. 435, 442, 109 S.Ct. 1892, 1898, 104 L.Ed.2d 487 (1989).

The OCC charged defendants with participating in a plan to have banks with which they were associated make nominee loans to nominal borrowers in a manner which allowed defendants to receive the benefit of the loans. The OCC asserted that this resulted in violations of the statutory restrictions regarding lending limits, those concerning loans to officers, directors or other controlling persons of banks, and the statutes requiring accurate recordation of loans on the books of national banks. The monetary sanctions were imposed by the OCC pursuant to the authority granted by 12 U.S.C. § 93(b) and 504, as well as 12 U.S.C. §§ 84 and 375a and 375b. In the indictment at issue, defendants are charged with, *inter alia,* violations of 18 U.S.C. § 656, which prohibits misapplication of bank funds. The government concedes that the violations which were the subject of the Consent Order and those charged in the indictment, are based on the same loan transactions. However, the government argues that different statutes are involved and, accordingly, different offenses are at issue for double jeopardy purposes. Defendants argue that, if the OCC proved the allegations which were the subject of a Consent Order, that same proof would also establish a violation of 18 U.S.C. § 656, the statute charged in the indictment.

A review of the evidence establishes that, for double jeopardy purposes, the Consent Order and the indictment involve the same conduct. As defendants correctly note, a violation of the statutes under which the OCC proceeded in the Consent Order necessarily encompasses a violation of 18 U.S.C. § 656. *United States v. Twiford,* 600 F.2d 1339, 1343-44 (10th Cir.1979). *See also United States v.*

Davis, 953 F.2d 1482, 1492 (10th Cir.1992). The broad range of conduct prohibited by 12 U.S.C. § 93(b) and § 504 necessarily encompasses the conduct which is the subject of 18 U.S.C. § 656. Furthermore, the same loan transactions are the subject of both the indictment and the Consent Order. As a result, this case is distinguishable from *Burke,* where the court determined double jeopardy was not violated because a cease and desist order addressed conduct occurring at a time different from that at issue in the challenged indictment. 940 F.2d at 1367.

Because the same conduct is addressed in the indictment and the Consent Order, the court must next determine whether the punishment imposed under the civil penalty is sufficient to invoke double jeopardy protection against the subsequent indictment. Double jeopardy does not apply where the civil penalty at issue is *solely* remedial, but applies if that penalty is also partially designed to punish. *Austin v. United States,* —— U.S. ——, ——, 113 S.Ct. 2801, 2802, 125 L.Ed.2d 488 (1993); *Hudson,* 14 F.2d at 540. It is not sufficient to show only that the statute authorizing the sanctions has a remedial purpose; rather, the sanctions themselves must be solely remedial. *Hudson,* 14 F.3d at 542. Furthermore, the government must identify the precise injury to the government which the sanction is designed to remedy and provide an accounting of the actual losses on which the sanctions are based. *Id.* If there is no injury to be remedied, the fines presumably were imposed to deter defendants from continued violations of the banking laws and, as a result, are punitive in nature. If there was an injury, then the fines must be imposed solely to remedy that injury to avoid double jeopardy. A civil penalty is generally punitive where it is overwhelmingly disproportionate to the damages caused. *United States v. Bizzell,* 921 F.2d 263, 267 (10th Cir. 1990), *citing Halper,* 490 U.S. at 449, 109 S.Ct. at 1902. However, a fine may be punitive even if it is reasonably related to the loss. *Hudson,* 14 F.3d at 543.

In this case, the government contends that the OCC fines were solely remedial. The evidence establishes that the OCC alleged the defendants collectively caused more than $900,000 in losses. Initially, the OCC recommended $100,000.00 civil penalty against Hudson and $75,000.00 penalties against both Baresel and Rackley. It also recommended prohibiting their future participation in banking. Daniel Stipano of the Enforcement and Compliance Division of the OCC testified that he endorsed that recommendation. In his recommendation, Stipano stated that the OCC could "accomplish a great deal by preventing these individuals from ever re-entering the banking industry and, through publicity of these actions, hopefully deter other individuals from similar conduct." Defendants's Exhibit 3, numbers 127-28. That conclusion was consistent with the OCC policy and procedures manual in effect at the time the penalties weer imposed in this case. The manual contains guidelines for sanctions, including civil money penalties. According to the manual, a civil money penalty can serve as a "deterrent to similar violations by the persons against whom the penalties are assessed and by other banks and bankers." The manual also provided that public disclosure of civil money penalties "may serve as a deterrent to future violations." Government Exhibit 21, pages 1, 3.

The evidence also reflects that the amount of the monetary penalties imposed on defendants was determined by use of the OCC "civil money penalty matrix." This was referred to as a "CMP matrix," and was used to determine the relative degree of severity of violations by assigning weight to certain factors which were to be considered when determining the amount of the penalty. Government Exhibit 21 at page 2. The factors considered included intent, number of violations and concealment of violations. Injury to the government was not listed as a factor on the CMP matrix. The evidence before the court does not indicate that injury to the government was considered by the OCC in deciding the amount of the penalties to be

imposed. Defendants' Exhibit 4. Mr. Stipano testified that the OCC did not have the legal authority to use its enforcement powers to compel officers and directors to make restitution under the statutory provisions in existence at the time the penalties were assessed.

The only evidence regarding government losses is that reflecting the OCC's investigative costs in this case which total approximately $72,000.00. However, the record contains no indication that these costs were considered by the OCC in determining the recommended fines by $100,000.00 against Hudson and $75,000.00 each against Baresel and Rackley. The total of these fines is also substantially greater than the investigative costs. Although the fines were subsequently reduced,[1] the evidence reflects that the reduction was based on the defendants' respective financial circumstances. No evidence suggests that the reduction was related to an assessment of government losses. The evidence establishes that the OCC monetary assessments against the defendants were not solely remedial. Assuming, *arguendo*, that these had some remedial purpose, the evidence establishes that they were at least partially designed to serve as a deterrent. Thus, the fines were punitive for double jeopardy purposes.

In accordance with the evidence before the court and the factors to be considered in determining whether double jeopardy is at issue, the indictment addresses the same conduct as the OCC Consent Order. Further, the monetary penalties imposed by the Consent Order are not solely remedial but are punitive in nature. Accordingly, proceeding with the indictments would subject defendants to double jeopardy, and the motion to dismiss the indictments is GRANTED.

IT IS SO ORDERED.

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[1] Hudson was ultimately fined $16,500.00, while Baresel was fined $15,000.00 and Rackley was fined $12,500.00.

APPENDIX C

[Filed Nov. 5, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CR 92-152-T

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants.

Defendants have filed a motion for stay or continuance of trial date pending timely filing by defendants of a petition for a writ of certiorari in the Supreme Court of the United States seeking review of the decision of the Court of Appeals for the Tenth Circuit reported as *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996). The cited decision is the second reported appellate decision in this cause. The first opinion of the Court of Appeals is reported as *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994).

Trial in the above-styled cause is currently scheduled to begin on November 12, 1996.

Defendants seek to continue or stay the trial date pending consideration by the Supreme Court of a petition for a writ of certiorari to review the decision of the Tenth Circuit which, defendants state, will be timely filed pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1. The question presented for Supreme Court review,

defendants state, will be whether the current indictment against defendants is barred by the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. Defendants have advised the Court that counsel for the government has been contacted with regard to the requested continuance or stay and has authorized for defendant John Hudson to state that the government has no objection to the requested relief.

Upon consideration of defendants' motion and supporting memorandum, it is hereby ordered that the motion is GRANTED.

The trial of this cause is removed from the November 1996 trial calendar pending timely filing by defendants of a petition for a writ of certiorari in the Supreme Court.

If the petition for a writ of certiorari is granted, this stay will remain in effect pending final disposition of the cause by the Supreme Court.

If the petition for a writ of certiorari is denied, this stay will terminate of its own force.

Pursuant to 18 U.S.C. § 3161(h)(1)(E), the Court finds that the period of the requested stay or continuance of trial is excluded from computation of the time within which trial for an offense must commence because the delay is delay "resulting from [an] interlocutory appeal". Interlocutory appeals on questions involving application of the Double Jeopardy Clause are authorized pursuant to the decision of the Supreme Court in *Abney v. United States*, 431 U.S. 651 (1977).

Alternatively, pursuant to 18 U.S.C. § 3161(8)(A) and (B), the Court finds that the period of delay resulting from the granting of this continuance serves the ends of justice and outweighs the best interests of the public and the defendant in a speedy trial. In support of the foregoing alternative finding, the Court observes that the significant Double Jeopardy questions which appear to be presented by this case have now been twice considered by

this Court and twice considered by the Court of Appeals. It is in the best interests of all parties, and of the public, that defendants be given an opportunity to present their petition for Supreme Court review of the Double Jeopardy issues prior to trial, if any, in accordance with the mandate of the Supreme Court in *Abney, supra.*

IT IS SO ORDERED this 5th day of November, 1996.

/s/ Ralph G. Thompson
RALPH G. THOMPSON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 95-6030

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
JOHN HUDSON; LARRY BARESEL; JACK B. RACKLEY,
Defendants-Appellees.

ORDER

Entered September 20, 1996

Before TACHA, LOGAN, and REAVLEY,* Circuit Judges.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER
Clerk

/s/ Opal A. Carter
By OPAL A. CARTER
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CR-92-0152-T

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
HAD ON APRIL 7, 1994
EVIDENTIARY HEARING ON
MONEY SANCTIONS ISSUE

Before the

HONORABLE RALPH G. THOMPSON

Judge Presiding

* * * *

[3] THE COURT: Good morning, ladies and gentlemen.

This is the United States of America versus John Hudson, Larry Baresel, and Jack Butler Rackley.

This is a hearing being held pursuant to the order of the United States Court of Appeals for the Tenth Circuit in this case which affirmed in part, reversed in part, vacated in part and remanded the case for further proceedings consistent with their opinion so that an evidentiary hearing could take place and factual determinations be made with regard to the issues subject of the remand.

And if counsel, beginning with the government, would make your appearance, we'll begin.

MR. OGILVIE: Good morning, Your Honor. Tim Ogilvie and Barbara Poarch on behalf of the United States.

Also present is special agent James Strickland of Federal Bureau of Investigation?

MR. NEVILLE: Drew Neville, B.J. Rothbaum, Your Honor, and Russell Cook for Mr. Hudson.

MR. ROLFE: Jim Rolfe for Larry Baresel.

MR. PRINGLE: And Lynn Pringle for Larry Baresel.

M. GILE: Merle Gile for Jack Rackley.

THE COURT: Are the defendants present for this hearing?

[4] MR. ROLFE: They are, Your Honor.

MR. NEVILLE: They are, Your Honor.

THE COURT: Thank you.

Would the government proceed, please.

MR. OGILVIE: Thank you, Your Honor.

If the Court would permit me, I'd like, maybe by way of introduction, to advise Your Honor that, prior to this hearing, counsel for all parties had a meeting concerning this hearing and the exhibits that we propose to introduce. Each side has disclosed to the other the exhibits that they intended to offer, and I think I can speak for counsel for all defendants as well as the government in saying that the documentary evidence that we want to introduce for the Court's consideration has all been stipulated to, and the Court—or the government would like to call one witness in addition to the exhibits that it would like to offer during this hearing.

THE COURT: Do you have the stipulation prepared to be recited for the record, or may it simply, on the basis of what you've said, be so stipulated?

MR. NEVILLE: Your Honor, we would be happy to so stipulate. We have reviewed—we have seen and reviewed the government's exhibits. We have no objection to their admissibility. I state that for the record and, I

think on behalf of all defendants; and as I understand, my agreement with Mr. Ogilive, he has received and reviewed all of our exhibits, and [5] he has no objection to the admissibility of our—of our exhibits, in order to expedite and shorten this hearing.

THE COURT: Thank you very much.

For the record, do the other defense counsel, on behalf of your respective clients, agree with what Mr. Neville has just announced?

MR. ROLFE: Yes, Your Honor.

MR. PRINGLE: Yes.

MR. GILE: Yes.

THE COURT: Excuse me, Mr. Gile.

Mr. Ogilive, do you make the same stipulation with regard to that.

MR. OGILVIE: I do, Your Honor.

THE COURT: Thank you all for that effort. That will streamline matters considerably.

MR. OGILVIE: The government would like to call one witness this morning, Your Honor. That's Daniel Stipano.

Daniel Stipano, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. OGILVIE:

Q. Sir, good morning. Would you please state your name.

A. I'm Daniel Stipano.

Q. And how are you employed, Mr. Stipano?

[6] A. I'm the Assistant Directory of the Enforcement and Compliance Division for the Office of Comptroller of the Currency.

Q. How long have you been with the O.C.C.?

A. Approximately nine years.

Q. And are you an attorney?

A. I am an attorney.

Q. How long have you been practicing law?

A. Approximately eleven years.

Q. The division within the O.C.C. that you are a part of, again, is what?

A. The enforcement/compliance division.

Q. And what are the duties of the enforcement and compliance division?

A. Our primary duties are to ensure that banks are operated in a safe and sound manner, and compliance with law.

Q. And the O.C.C. is the agency, isn't it, that supervises national banks?

A. We are the primary regulator of national banks.

Q. What position do you hold within the enforcement and compliance divisions?

A. As I mentioned, I am the assistant director.

Q. And how long have you been assistant director?

A. For almost five years.

Q. And does your position as assistant director give you an [7] understanding and some input of what the O.C.C.'s policies are concerning the enforcement of banking regulations?

A. Very much so. In the enforcement area, part of my job is to help draft policies on enforcement-related matters.

Q. And does your position as assistant director also give you familiarity with the regulations and the laws that banks must adhere to?

A. Yes.

Q. Are you familiar with the O.C.C. civil money penalties assessed against Mr. Hudson, Baresel, and Mr. Rackley?

A. Yes, I am.

Q. How is it that the—the acts that led to these civil money penalties came to your attention?

A. In 1988, I was the staff attorney for the O.C.C who was assigned to review and investigate these matters.

Q. And who was that?

A. No, I was the staff attorney.

Q. I'm sorry. And who referred that information to you?

A. The initial referral was made by Larry Burch. He is a national bank examiner who works in our Oklahoma City office. Mr. Burch made a referral from his 1987 examinations of the First National Bank of Tipton and the First National Bank of Hammon, Oklahoma.

That referral was reviewed in our Dallas district office and subsequently referred to Washington. I was the staff [8] attorney who received the referral, reviewed it, and made recommendations on it.

Q. What recommendation did you make?

A. My initial recommendation was to commence a formal investigation.

Q. And were you the attorney who was in charge of the formal investigation?

A. I was in charge. Yes.

Q. Does a person have to hold a certain office, either in a bank or a bank holding company, before they are subject to O.C.C. jurisdiction, as it were?

A. Yes. The statute has changed since 1988, but at the time, the individual had to be an officer or director or a person participating in the affairs of the institution.

Q. And did Messrs. Hudson, Baresel, and Rackley all fit within that description?

A. Yes, there did.

Q. What happened as this normal investigation commenced?

A. The investigation was commenced to discover additional facts concerning the transactions that had been referred to us, and in order to develop the factual record, we took a series of depositions, primarily in Oklahoma City, of the people—the people who were the principals of the transaction as well as a number of the borrowers. The investigation lasted approximately 100 days.

[9] At the conclusion of the investigation, I presented my findings to the O.C.C.'s supervision review committee, which is a charging body within the agency composed

of senior agency officials who are responsible for such matters. My findings were that Mr. Hudson, Mr. Rackley, and Mr. Baresel had all participated in violations of the bank's lending limit, both at Tipton and Hammon, and in violations of Regulation O, which is the Federal Reserve regulation which governs the amount of money that can be lent to insiders.

Based on those violations, I recommended that civil money—civil money penalties be assessed against all three individuals and that they be removed from the banking industry, as well.

Q. Why was it that the O.C.C. was concerned with violations of a bank's lending limit?

A. The lending limit is a—is a very old statute that governs the amount of money that a bank can loan to any one particular borrower. The purpose of the lending limit, generally speaking, is to prevent a bank from loaning too much money to any one particular borrower so that they'd be putting all their eggs in one basket. Another purpose of it is to make sure that the bank is meeting the credit needs of the community by spreading credit around among a lot of people, not just one borrower.

Q. What was the O.C.C.'s concern concerning the [10] insider transactions?

A. There are very stringent limits on the amount of money and the types of loans that can be made to insiders.

The problem with Tipton and Hammon was that the loans in question, which we felt were all attributable to Mr. Hudson, because he benefited from them, exceeded five percent of the bank's capital. The law provides that once borrowings to any particular insider exceed five percent, they can only be made with prior board approval with the individual in question abstaining from the vote. In this case, there was no prior board approval obtained for the advances.

Q. As you began the investigation into these particular transactions, were you made aware of whether or not there had been any previous violations involving either

Tipton or Hammon during the time Mr. Hudson was the principal shareholder?

A. Yes, I was.

Q. What—tell us about the history of the violations that led up to the findings that you made.

A. The bank had been—or the bank had been cited for insider violations at the previous exam, both at Tipton and at Hammon. These were exams that were conducted in 1986.

In addition, both institutions were operating under a formal agreement. This is an enforceable document that are put on banks that are in a troubled condition. It is designed to force the banks to correct their policies and procedures and [11] take corrective actions so that they operate in a safe and sound manner in compliance with the law.

Q. How seriously does the O.C.C. construe the existence of a formal agreement?

A. It's very serious. In terms of the—if you could look at it in terms of the hierarchy or enforcement actions, the O.C.C. will take actions ranging from informal actions, which could be just morally suasion, asking the bank to pass a board resolution, or enter into a non-enforceable document, like a memorandum of understanding or a commitment letter. The most serious sanction in that hierarchy would be a cease and desist order. The second most serious action would be a formal written agreement.

Q. Did the O.C.C. make attempts at some of these lesser remedies, such as the memorandums of understanding or the commitment letters?

A. No, I believe that the—I believe that the first enforcement action that was taken against the institutions was a formal agreement in both cases. The reason for that being that, by the time the banks had been examined in 1986, their conditions had deteriorated to the point where we felt that we would best be able to address the problems through a more formal document.

Q. And who all were the parties to the formal agreements?

A. The board of directors of both banks and a representative [12] of the comptroller.

Q. Did the bann, in that formal agreement, agree to correct the lending limit and insider transaction violations?

A. I—I don't recall, I'd have to see the document.

Q. What else transpired during your investigation then into—into these transactions?

A. We—as I say, once the investigation was concluded, I presented my findings to the enforcement—supervision review committee, may have been called "enforcement review committee" at that time, and they agreed with my recommendations.

So notices of intent to remove and subsequent notices, penalty assessments notices were drafted and served on the respondents, and an administrative proceeding was commenced against all three of them.

Q. Is the decision then to assess civil money penalties and the decision to seek removal then is not made by any one particular person; is that correct?

A. Oh, no, no, no. It's made by the supervision review committee who—who acts as a advisory body for the senior deputy controller of the banks division.

Q. How many people sit on that committee?

A. I believe there are six.

Q. Prior to the—the issuances of these notice to assess civil money penalties and intent to remove these three defendants from banking, did the O.C.C. cause what is known as [13] 15-day letters to be sent to each of these gentlemen?

A. Yes, they did.

Q. And could you explain to Judge Thompson would a 15-day letter is.

A. By statute, before we assess a civil money penalty, the agency is supposed to consider certain statutory factors. They cover things like the gravity of the violation, the history of previous violations, the financial resources

of the individual, and other factors that justice may require.

In order to solicit that feedback so that we—we have information on all those factors when we make a charging decision, we send what's called a 15-day letter, and those are the letters that each of these three individuals received.

Q. Would you please open up the black notebook that's on the table in front of you and look at Exhibits 1 through 4, and please tell us whether or not these are 15-day letters that were sent to Mr. Hudson.

A. Yes, they are.

Q. And it appears that there are two concerning Tipton and two concerning Hammon, each with respect to a different date of a report of supervisory activity; is that correct?

A. Yeah. The first one concerns the report of supervisory activity from September 30th of 1986, the second one is from the report of May 31st, 1987, and the third from September 30th, 1986, and the final one was from May 31st of 1987.

[14] Q. Would you please turn to Exhibit Number 5. This is the response that Mr. Hudson provided to the O.C.C.?

A. Yes.

Q. And this is in response to the 15-day letter; correct?

A. Yes, it is.

Q. And at the very end of this exhibit there is a fairly detailed financial statement from Mr. Hudson. Do you see that?

A. I do.

Q. Was financial information requested of Mr. Hudson in the 15-day letter?

A. Yes, it was.

Q. Why was the O.C.C. concerned with what Mr. Hudson's financial condition was?

A. Well, as I—as I mentioned, the statute requires us to consider the financial capabilities of the individual when

we assess a civil money penalty. So we asked or that information from all three respondents. We received it from Mr. Hudson, and it was taken into account in fixing the size of the civil money penalty.

Q. And at some point then thereafter, notices of assessment of civil money penalties and notice of removal were served on all three defendants; correct?

A. Yes.

Q. And would you turn to Exhibit Number 6. Is this that [15] notice that's addressed to Mr. Hudson, Mr. Rackley, and Mr. Baresel?

A. Yes, it is.

Q. Would you please pay—turn, excuse me, to page 12 of this notice, in the second full paragraph, where it says "take notice." Do you see that paragraph?

A. I do.

Q. It mentions that the respondents, that being the three defendants here,—correct?

A. Yes.

Q. —could have a hearing, if they wanted to, before the comptroller?

A. Yes.

Q. Did they elect to have a hearing or not?

A. I—I don't specifically recall them filing a request for hearing, but I will assume that they did because we went ahead and—and proceeded down the road in the administrative process before an administrative law judge. So I'll assume that they did request hearings.

Q. Please turn to Exihibit Number 7. Is this the stipulation and consent order that effectively terminated the O.C.C.'s proceeding against Mr. Hudson?

A. It is.

Q. And by signing this, did Mr. Hudson agree that he had committed the violations that the O.C.C. said that he had [16] committed?

A. No, he did not.

Q. Does this also waive any further rights to have—whether or not he had committed these acts—litigated before an administrative law judge?

A. Yeah. He—he waived any ability to challenge the validity of the order.

Q. Did the O.C.C.'s inquiry then into Mr. Hudson with respect to these transactions cease when this stipulation and consent order was signed?

A. Yes.

Q. Would you please turn to Exhibits Number 8 and 9. Are these the 15-day letters that were served on Mr. Baresel?

A. Yeah. The first one, again, is from September 30th, 1986 examination, and the second is from the—UHM—the second one also appears to be from the same examinations.

Q. But they were two different banks; correct?

A. Yes. The first one was First National Bank of Tipton, and the second was First National Bank of Hammon.

This—this indicates that there was an earlier civil money penalty referral from the 1986 exam as well as one from the 1987 exam. That's why there are two letters.

Q. And Mr. Baresel provided two responses as indicated by Exhibits Number 10 and 11; correct?

A. Yes.

[17] Q. And did he also provide financial information in his responses?

A. Yes, he did

Q. And was that requested by the O.C.C. for the same reason it was requested of Mr. Hudson?

A. It was.

Q. Would you please turn to exhibit number 12. Is this the stipulation and consent order that terminated the O.C.C.'s proceedings against Mr. Baresel?

A. Yes.

Q. In signing this, did Mr. Baresel admit that he had done the acts that the O.C.C. said that he had?

A. No, he did.

Q. Did he also waive, by signing this document, his right to have those facts litigated before an administrative law judge?

A. Yes, he did.

Q. So did the execution of this document also terminate O.C.C. proceedings with respect to Mr. Baresel?

A. It did.

Q. Would you please turn now to government exhibits number 13 and 14. Are these the two 15-day letters that were sent to Mr. Rackley?

A. Yes, they are.

Q. And did Mr. Rackley also submit two responses, one for each bank, as indicated in government exhibits 15 and 16?

[18] A. He did.

Q. Did he also—I'm sorry, I think I've—I asked you this already—provide financial information to the O.C.C. with this response?

A. Yes.

Q. And was that requested of Mr. Rackley for the same reason it was requuested of Messrs. Hudson and Baresel?

A. It was.

Q. Would you look at government's exhibit number 17. Is this the stipulation and consent order that terminated the O.C.C.'s proceedings against Mr. Rackley?

A. Yes.

Q. And in signing this, did Mr. Rackley admit whether he had done the acts that the O.C.C. said that he had?

A. No, there was no admission.

Q. And did he also waive his right to have that fact litigated before an administrative law judge?

A. Yes, he did.

Q. If you had noticed by looking at the stipulation and consent orders, each of these three defendants consented to a civil money penalty far less than what had originally been assessed against them.

A. Yes, they did.

Q. And do you know the reason for that?

A. Yeah. The primary reason was they had no money. Judging [19] from the representation that each of them had made about their financial condition, they did not appear to have the financial means to pay the penalties as assessed in the notice.

There's another reason, as well, which is that the agency will frequently settle cases, as we did here, because it gets the matter behind us. If we had to choose to hold out and litigate it, it could have been, you know, a year or two down the road before we would finally get a resolution of the matter.

This settlement provided us with certainty. We knew we were going to get civil money penalties in the amounts indicated, and we also knew that we were going to have these three individuals removed from the banking industry.

Q. And they consented to that, as well, correct,—

A. Yes, they did.

Q. —the removal?

A. Yes.

Q. Is the final figure of the civil money penalties then more reflective of the seiousness of the harm that they had caused or more reflective of their financial condition at the time?

A. It's really a mixture of the two. In this case, I mean, their financial conditions were so poor that we—we really couldn't assess a penalty that we thought was proportionate to the harm. We assessed a penalty that we felt was appropriate given the harm as well as their financial conditions.

Q. If you would, please look at the other set of exhibits, [20] the defendants' exhibits that are on the table next to you, at exihibit number 5, the affidavit of Susie Pritchett.

A. Okay.

Q. Would you please turn to page 4 at paragraph E.

A. Okay.

Q. Do you have that—that sentence? Ms. Pritchett says in her affidavit, "I do not recall there being any discussion or government demand that Baresel or the others make restitution for any losses"; correct?

A. Yes, I see that.

Q. Is that a true statement?

A. I—I don't recall if there was any discussion, but if there wasn't any discussion, the reason was we did not have the legal authority to use our enforcement powers to compel officers and directors to make restitution at the time.

Q. Has that been changed today by statute?

A. Yeah. There was a—a legislative fix that was put in place in 1989 as part of the F.I.R.R.E.A., the Financial Institutions Reform, Recovery and Enforcement Act, that allowed the O.C.C. and the other banking agencies to use their cease and desist powers to compel restitution. However, at the time, the governing precedent was a case called Laramore versus the Comptroller of the Currency, which held that we did not have the authority to use our cease and desist powers that way. We followed that decision and, therefore, we did not feel that we [21] had the legal authority to order restitution at the time.

Q. Would assessment then of a civil money penalty be the only way that the—the O.C.C., by itself, could have obtained any kind of enforceable money judgment, penalty, whatever, against these three defendants?

A. Yes.

Q. Would you please turn to government exhibit number 19.

A. Okay.

Q. Okay. Could you explain what this letter is?

A. Yeah. This is a letter that I wrote to you which addresses a number of things.

The—the first part of it, under number 1, is an estimated cost of the investigation and administrative actions that the O.C.C. incurred.

Q. And you have there costs associated with your work, that of Rosmary Cole, attorney, and Adam Bioloski, and Larry Burch, the examiner; correct?

A. Yes.

Q. In addition to these persons, were there others who also worked on the investigations into Messrs. Hudson, Baresel and Rackley?

A. Yes. Larry—Larry Burch was the examiner in charge of the examination. He had a crew with him when he did the exam. I wouldn't know how many people were on the crew, but it's fair to say that he—he didn't do it by himself.

[22] There's also, obviously, clerical support at all levels, at the duty-station level, the district office, the Washington office, there were funds paid to the administrative law judge who heard the case, there were other—other expenses, as well.

Q. And would other people, such as Elizabeth Cory, to whom the 15-day letter responses are directed, who also worked on this investigation?

A. Yeah, Elizabeth was the—Elizabeth Cory was the initial reviewing attorney in the Dallas district office, and she—she did work on it at that level.

Q. Would you please turn to exhibit number 20, government's exhibit, and explain what this document is.

A. This is the Federal Financial Institution's examination council. It's their policy on the assessment of civil money penalties.

Q. And this one was in effect as of what day?

A. This became effective on July 23rd, 1980.

Q. And would you turn to exhibit number 21 and explain what this is.

A. This is an excerpt from the O.C.C.'s policies and procedural—procedures manual. It is—is the O.C.C. civil money penalty policy that was in effect at—as of January 28th, 1988.

Q. And is this the one that was in effect at the time the [23] stipulation and consent orders were entered into by these three defendants?

A. Yes.

Q. Do you see the paragraph on Exhibit Number 21 headed "Purpose" on the first page?

A. Yes.

Q. Would you read the sentence that's there in the second paragraph that begins "these policies"?

A. It states: "These policies are internal guidelines for the use of the O.C.C. and do not create any substantive or procedural rights enforceable at law or in any administrative hearing."

Q. Are the powers that the O.C.C. has granted to it by Congress?

A. Yes.

Q. And Exhibit Number 22: Could you explain what this is.

A. This is a later version of the same policy.

Q. That's dated—when did this one go into effect?

A. April 8th, 1991.

Q. And Exhibit Number 23: What is that?

A. Yet another version of it. This is the most recent one. It was issued on June 16th, 1993.

Q. During this period of time, had Congress changed the law with respect to what powers the O.C.C. had? Is that why there are changes in this policy statement?

[24] A. Yeah. The—the reason we changed the 1988 one and issued the 1991 policy was because of the enactment of F.I.R.R.E.A., which I mentioned earlier.

Prior to F.I.R.R.E.A., the O.C.C.'s authority was that we could assess civil money penalties of a thousand dollars a day. After F.I.R.R.E.A., there was a three-tiered structure that was put in place that was a substantive change in the law, and we felt that in order to have our policy conform to the new law, we needed to revise the policies. That's why we did it.

The penalties against Mr. Hudson, Mr. Rackley and Mr. Baresel were under the pre-F.I.R.R.E.A. law.

Q. So the appropriate policy again would have been Exhibit Number 21, January 28th, 1988?

A. Yes.

Q. What is it that the O.C.C. was trying to accomplish in assessing civil money penalties and the removal actions against Messrs. Hudson, Baresel and Rackley?

A. The purpose of civil money penalties is to deter future violations of law or encourage the correction of existing violations, and that's what we were hoping to accomplish.

The purpose of the removal action is to prevent the person from working in the banking industry again so that they cannot engage in additional violations or inside practices.

Q. Do you know what the amount of losses due to loans that are mentioned in the 15-day letters were at Hammon and Tipton?

[25] A. Yeah. In both cases, they were slightly under half a million dollars. The aggregate loss at the two institutions was between 900,000 and $1 million.

Q. Do you know who actually bore the costs of those losses?

A. The Federal Deposit Insurance Fund.

Q. And what kind of agency is that?

A. It's a government agency.

Q. During the time that you had negotiations with Susie Pritchett on Mr. Baresel's behalf, did you know that there was a pending criminal investigation concerning these same transactions?

A. I did.

Q. Did Ms. Pritchett know?

A. Yes.

Q. Did Mr. Baresel know?

A. Yes.

Q. Do you know whether or not Mr. Hudson knew?

A. I think he was aware of it. We had discussions with him, and I recall that at the prehearing conference that was held in the administrative case, that was a matter of concern to Mr. Hudson.

Q. And do you know whether or not Mr. Rackley knew?

A. Mr. Rackley knew, as well.

I would also add that I deposed all three individuals as part of my investigation. My recollection is that Mr. Hudson [26] and Mr. Baresel took the Fifth Amendment to every question, and Mr. Rackley took the Fifth Amendment to a number of questions.

Q. What group is it—what class of people is it that the O.C.C. exists to protect?

A. The depositions of the financial institutions.

Q. And were the actions taken by the O.C.C. in this case against Hudson, Baresel and Rackley designed to achieve that end, to protect the depositors at Hammon and Tipton?

A. In my judgment, yes.

MR. OGILVIE: May I have just one moment, please, Your Honor?

THE COURT: Yes.

MR. OGILVIE: That's all I have of Mr. Stipano, Your Honor.

CROSS-EXAMINATION

BY MR. NEVILLE:

Q. Mr. Stipano, with respect to Government's Exhibit Number 22, which was, I believe, a policy statement by the Comptroller's Office,—

A. Yes.

Q. —that went—that statement went into effect in 1991; is that correct?

A. It did.

Q. And that, of course, was after the stipulation and consent order that had been entered into by all of the defendants in [27] this case; correct?

A. That is correct.

Q. Now, plaintiff's exhibit number 19, which, I believe, is your letter to Mr. Ogilvie in April of this year,—

A. Yes.

Q. —what was the purpose of you sending the letter to Mr. Ogilvie?

A. He asked me for a breakdown of how much the agency spent on the investigation and prosecution.

Q. And that was for purposes of establishing what you claim to be the government loss for purposes of this hearing?

A. I don't know why he wanted it. He asked me to provide it.

Q. When did you first start to assemble the information that's set forth in the Government Exhibit 19?

A. I don't have a precise date. My—well, for—the specific information in the letter I started putting together probably, say, a week to a week-and-a-half before the date of the letter.

Q. That would be late March or early April—

A. Yes.

Q. —of this year?

A. Yes.

Q. All right. And there's a line item called "estimated costs of investigation and administrative action to the O.C.C."

A. Yes, sir.

[28] Q. And what do you mean "estimated costs"?

A. Well, in some areas I was able to provide a figure that I think has a degree of reliability. For example, on travel expenses, the—all of us—all of the people that work for the agency are required to submit travel vouchers, and I was able to retrieve the travel vouchers and just add up the costs.

In other areas, I think it's less precise, you know, at this late date, to go back and to try to figure out what—what the cost was.

So, for example, for salary, I would take my salary at the time and divide it by what I thought was the percentage of time that I had spent on the case during the relevant time period to arrive at a figure.

Q. And—And I'm not trying to be nosey, but what was the percentage that you used?

A. My estimate—my average salarly during the period was $49,800, and I estimated I'd spent a third of my time on this.

Q. Okay. So you spent two-thirds of your time on other matters?

A. Yeath.

Q. So this—the Hudson-related matter was not the only investigation that you had going?

A. It was the only investigation I had going. Yes.

Q. Okay, but you were tending to other matters in the Comptroller's Office, I take it,—

[29] A. Yes.

Q. —related to enforcement and compliance?

A. Yes.

Q. And I think it if the Hudson matter had not been on the table, so to speak, you would have still been working for the Comptroller's Office.

A. I hope so.

Q. And that would have been the same with Mrs. Burch or—or Mr. Burch and Mr. Hill?

A. As far as I know, yeah.

Q. And they would have had other matters they would have been tending to, as well; correct?

A. Sure.

Q. Now, also you factored into the cost something called "benefits"; is that right?

A. Yes.

Q. And is the government in this proceeding claiming, as part of their investigatory loss, some bene- —some kind of benefits?

A. No, it's—it's just a percentage of our total compensation. It's just a—I multiplied our salary—the percentage of our salaries by 36 percent.

Q. Okay. What kind of benefits? Are we talking health care and—

A. Yeah, exactly.

[30] Q. —that kind of thing?

A. Yes.

Q. So that that's part of the so-called investigative loss that the government's—

A. Well, it's part of our—our compensation as government employees.

Q. Is that part of the investigative cost that you're asking the court to consider in determining whether the civil monetary penalties were solely remedial as opposed to punishment?

A. I—not directly. No.

Q. Now, the notice of assessment that you made an earlier reference to, that was issued in February of 1989; is that correct?

A. Is there a copy of it in the exhibits?

Q. You might look on—in the defendants' list as Bates Number 00153, and that will either be exhibit 2 or 3, but there'll be—you'll see a Bates number in the lower right-hand side. Be in Exhibit 3.

A. Yeath, I—I found it.

Your question goes to the notice of assessment?

Q. Yes, the date that it was issued. The date I have is February of 1989.

A. February 13th, 1989.

Q. Yes. And when did the Office of the Comptroller first consider assessing the sum, the amount of $100,000 against [31] Hudson and $50,000 against Baresel and Rackley, and I'm talking about the amount?

A. The amount would first have been considered when I presented the findings of my investigation to the

supervision review committee. I don't have a precise date. It would probably have been January of '89.

Q. Well, isn't it true that Mrs. Elizabeth Cory established the sum of $100,000 to be assessed against Mr. Hudson, Rackley—or Mr. Hudson, $50,000 against Baresel and Rackley, in March of 1988?

A. No. Ms. Cory had no authority to establish any penalty.

Q. Okay. Didn't she make a recommendation in that regard?

A. I don't know if she did or not. If it's—

Q. Okay. Let me invite your attention to defendants' exhibit number 2 and the Bates Stamp 00032.

A. Okay. She made a recommendation to that effect.

Q. Yes, sir. And you identified this Bates Number 00032 in Exhibit 2 as being Mrs. Cory's memorandum to Mr. Bodner dated 3-23-88, just to make sure we're all reading from the same page?

A. That's correct.

Q. And Mrs. Cory, after reviewing all of the facts set forth in—in an '86 examination and in an '87 examination, Mrs. Cory, in March of '88, made a recommendation of a $100,000 assessment against Mr. Baresel; is that correct?

[32] A. Yes, she did.

Q. Or Mr. Hudson, is that correct?

A. A hundred thousand against Mr. Hudson.

Q. And 50,000 against Rackley and Baresel; correct?

A. No, she recommended 75,000.

Q. Okay. She made a recommendation of an amount?

A. Yes, she did.

Q. Okay. Against the other defendants; correct?

A. That's correct.

Q. And that was prior to the time that the Government incurred all of these—this $72,500 in investigatory expenses; correct?

A. Yeah. Yes, that's correct. Although, I—let me—I'm sorry, let me clarify that. Probably a portion of the

examiner, Larry Burch's, expenses had already been incurred, because he had done the examination.

Q. Okay. But my point is that the amount—there had been a recommendation of a hundred thousand dollars against Mr. Hudson. After Mrs. Cory reviewed all of the '86 and '87 examinations of the bank, she made that recommendation in March of '88?

A. She did.

Q. And, in fact, that's what ultimately was assessed against Mr. Hudson, at least initially.

A. Yes.

[33] Q. And that was prior to the time that the—these deposition expenses were—were incurred by the Government; correct?

A. Mrs.Cory's recommendation was prior to the investigation.

Q. Yeah.

Now, you indicated also that you had financial information from Mr. Hudson?

A. Yeah, as—as provided in—in his 15-day letter response.

Q. And you received financial information from Mr. Hudson prior to the notice of assesment; did you not?

A. I did.

Q. In fact, you had financial information from Mr. Hudson in February of 1988; correct?

If you want to take a look at plaintiff's exhibit number 5, or Government's exhibit number 5, which should be a letter.

A. Yes.

Q. Okay. That a letter—just for the record, that's a letter from Mr. Hudson's counsel to Mrs. Cory; correct?

A. Yes.

Q. And it sets forth Mr. Hudson's positions with respect to the comptroller's allegations?

A. It does.

Q. Those allegations having been made in the 15-day letters [34] that we—that you earlier talked about; correct?

A. Yes.

Q. But this letter, February the 8th of '88, of course, predates the depositions and—that took place; correct?

A. It does.

Q. And in February of '88, prior to the time the assessments were actually made, this letter provided the Government or the O.C.C. with information concerning Mr. Hudson's financial condition; correct?

A. Yes.

Q. And in fact, Mr. Hudson's counsel—you were advised through his counsel that Mr. Hudson had a negative net worth of some $5 million; correct? Page 14, if that will aid you.

Mr. Stipano, I'm not—I don't want to deter you from looking at anything you want to look in the exhibit, but if I may invite your attention to exhibit 14 in the February 8th, 1988 letter.

A. Exhibit 14?

Q. Page 14.

A. Page 14.

Q. Yes.

A. In the letter itself as opposed to a supplement?

Q. Yes. And if you—

A. Okay.

Q. I'm not trying to prevent you from looking at the [35] supplement?

A. I know. I know. Yeah, it—it shows a net worth of negative—negative—slightly over a negative 5.7 million.

Q. And you had that information prior to the time that you assessed the hundred thousand dollar figure?

A. Yes.

Q. So, basically, at least initially, the comptroller assessed a hundred thousand dollar civil monetary penalty

against Mr. Hudson in the face of a negative net worth of what was represented to you to be $5 million; correct?

A. Yes.

Q. And Mr. Baresel and Mr. Rackley, you had financial information on them, as well; did you not?

A. We did.

Q. And that information, basically, showed a very weak financial condition; correct?

A. Yes.

Q. And you had that information prior to the time the Government initiated the investigation, the costs of which you have referenced in the letter.

A. We did.

Q. Now, the total, if I understand correctly, in your letter—your April letter to Mr. Ogilvie, the investigatory loss was $72,000? Isn't that what it totaled?

A. The—the cost to the Government, the O.C.C.—to the [36] O.C.C., I would say was approximately 72,000.

Q. Okay. And, of course, I suppose if you had wanted to, you could have made those same estimates in 1988; could you have not?

A. I don't understand the question.

Q. Well, you provided Mr. Ogilvie with a letter estimating—

A. Oh.

Q. —the cost breakdown to the O.C.C.—

A. Yes.

Q. —as a result of this investigation?

And that same information would have been available to you in early 1989; would it—would it have not?

A. It—it would have been available as of the time when we settled the case.

Q. Okay. Which was in—in what? The fall of '89?

A. Yeah. November.

Q. And wouldn't a substantial amount of that information have been available to you in early 1989?

A. Yeah, some of it would.

Q. Yeah. That's because all the depositions were taken in the fall of '88; correct?

A. That's correct.

Q. And would it not be fair to say that at least some or maybe even a substantial part of this $72,000 that you've set forth in your letter, you could have made that determination of [37] at least part of it prior to the time you sent out the notice of assessment?

A. Part of it, yes.

Q. Okay. And do you have any idea what the—the costs would have been at the time you sent out the notice of assessment?

A. I don't really—can't calculate that in my head.

Q. Okay. But, in summary, we have an assessment of a $100,000 in February of '89; correct?

A. Yes.

Q. You have investigatory losses to the Government, to the O.C.C., you claim to be some $72,000; right?

A. Yes.

Q. And you have Mr. Hudson with a negative net worth of some $5 million.

A. Yes.

Q. Then the amount was compromised later to the amount of $16,500; correct?

A. Yes.

Q. And the reason for that was because of the weak financial condition of Mr. Hudson?

A. Yeah, that was one reason, and also in order to—to bring the matter to closure for the O.C.C.'s purposes and to provide certainty in our relief.

Q. Now, let me invite your attention, if I may, to Government [38] Exhibit 18. Do you have Government's Exhibit 18 in front of you?

A. I do.

Q. This is Mr. Bioloski's memo of November of 1989 in regard to the compromise of the civil monetary penalties; correct?

A. Yes.

Q. And it's signed off on by several individuals at the bottom of the page; correct?

A. It is.

Q. Then there are some handwritten notations? Do you that? The lower right-hand corner.

A. Yes.

Q. And if I read it, and please correct me if I'm wrong, it says, "I agree with publication."

A. Yes.

Q. Okay. Meaning that the comptroller's office was intending to publicize the amount of civil monetary penalties assessed against all of the defendant's as well as their stipulation and consent order removing them from banking.

A. Yes.

Q. And that is consistent with an existing policy statement of the Government that existed at the time in regard to civil monetary penalties; correct?

A. Well, it was the law at the time. Any final order that was entered into after F.I.R.R.E.A. had to be made public as a [39] matter of law.

Q. Okay. Well, and there's a comptroller policy with regard to publication; is there not?

A. Well, in addition to the —the publicity that's mandated by statute, the policy at the time is that, on a case-by-case basis, the O.C.C. would also issue press releases on settlements.

Q. Yes. And on this case, the O.C.C. decided to issue a press release on these civil monetary penalties; didn't they?

A. Yes.

Q. And that—that decision is guided by a policy; is it not?

A. I think it's referenced in the civil money penalty policy.

Q. Yes. It's referenced in plaintiff's Exhibit Number 21; isn't it?

A. Yes.

Q. In fact, there's—Mr. Ogilvie had you read from the purpose section. There's a policy section on plaintiff's—or Government's Exhibit 21; is there not?

A. There is.

Q. And this was the—this was the comptroller's policy at the time the civil monetary penalties were assessed against the defendants; correct?

A. That's correct.

Q. And would you just read, please, the first sentence under [40] "policy."

A. "A civil money penalty can effectively deter or encourage correction of violations of laws, regulations, and cease and desist orders."

Q. And, in fact, the last sentence goes on to say that, "a C.M.P.—"

That's correct's a civil monetary penalty; isn't it?

A. It is.

Q. "—may also serve as a deterrent to similar violations."

A. Yes. It says, "A.C.M.P. may also serve as a deterrent to similar violations both by the persons against whom the penalties are assessed and by other banks and bankers."

Q. Okay. And then you made reference to, in certain cases, the comptroller's office would publicize the—the final order or the stipulation and consent order as well as the civil monetary penalties; correct?

A. I'm not sure I understand the question.

Q. Well, I may have muddled it. I'm sorry.

You indicated earlier that in certain cases—

A. Uh-huh.

Q. —the comptroller's office would publicize the stipulation and consent order which, of course, contained the amount of the civil monetary penalty.

A. Yes. But again, by law we are required to make the final [41] orders public,—

Q. Okay.

A. —and, in addition to that, we sometimes issue press releases on settlements.

Q. And isn't it true that, according to your policies, that that disclosure may serve as a deterrent to future violations—

A. Yes.

Q. —as well as be therapeutic to the system; correct?

A. Yes.

Q. In fact, there's—there's kind of a dual purpose associated with publicizing and telling the public about the amount of the civil monetary penalties and the actions that were taken by the comptrollers; right?

A. Yeah. In—in my judgment, the purpose is—is deterrents and also to show that when violations of law are committed and the O.C.C. detects them, we will take an appropriate supervisory enforcement action.

Q. And part of the reasons is deterrents?

A. Absolutely.

Q. Now, when was it that the comptroller, or someone in the comptroller's office, first considered assessing civil monetary penalties against Mr. Hudson?

A. That's a hard question to answer. The only body within the agency that had the authority to assess these penalties was [42] the Washington Supervision Review Committee, and the first time that a recommendation was made to assess civil money penalties was in January of 1989.

Q. Well, Mr.—didn't Mr. Burch recommend assessment of civil monetary penalties back in 1987?

A. Mr. Burch submitted a referral recommending that, yes,—

Q. Okay?

A. —but he—he didn't have the authority to do it.

Q. Okay, but Mr. Burch is a national bank examiner; correct?

A. Yes.

Q. Became in and examined the banks in question in this case; correct?

A. Yes.

Q. And he did that in the fall of 1987?

A. I—I don't have the precise dates, but—

Q. Okay.

A. —he examined them in 1987.

Q. Let me invite you to defendants' Exhibit Number 2, and you might take a look at Bates Number 00040.

A. What's the page number?

Q. 00040. It ought to be in the lower right-hand corner. Defendants' Exhibit 2.

A. Okay.

Q. And that's Mr. Burch's memo to Mr. Kraft of 9-21-87; correct?

[43] A. Yes, it is.

Q. And that—the subject of his memo is a civil monetary penalty referral; correct?

A. That is correct.

Q. And he recommended assessment of the civil monetary penalty in September of '87; did he not?

A. Yes.

Q. Okay. And he made that assessment after making at least some of a factual investigation into the case; correct?

A. He conducted an examination of the banks.

Q. Yeah. Which involved some review or investigation of what he perceived to be the defendants' conduct in this case; correct?

A. In a sense. I mean, it was a—my understanding is that it was a full-scope exam that looked at all aspects of the banks' operations, including compliance with law.

Q. Now, there was an Office of the Comptroller policy in effect in September of 1987 with respect to the assessment of civil monetary penalties; was there not?

A. Yes.

Q. And that's set forth in dependants' Exhibit Number 1; is it not?

A. Yes. Part of it.

Q. Part of it?

A. Yeah.

[44] Q. Okay.

A. Two out of 30 pages.

Q. Yes. And this policy statement was in effect at the time Mr. Burch made—was making his investigation and review; correct?

A. This—this was in effect at the time that Mr. Burch did the examination and submitted his referral.

Q. Yes. And isn't it true that the policy of the Comptroller at the time that Mr. Burch did his report in September of '87 and recommended civil monetary penalties was that civil monetary penalties should provide a deterrent to similar violations?

A. Yes.

Q. And on page 2 of the policy, again referring to defendants' Exhibit Number 1, it sets forth what should be considered in determining the amount of the civil monetary penalty; correct?

A. Yes.

Q. And what is supposed to be considered in the amount of the civil monetary penalty is good faith. I suppose that's the good faith of the defendants or what the Comptroller perceives to be the good faith of the defendants; correct?

A. Good or bad faith. Yes.

Q. Yes. The gravity of the violation?

A. Yes.

[45] Q. Would that include whether or not, in the comptroller's view, the defendants had violated the law?

A. If they hadn't violated the law, there wouldn't—there couldn't be a civil money penalty.

Q. Right. So it would necessarily include—

A. Yeah, the—

Q. —a perceived—or a conclusion that they'd violated the law?

A. Yeah. In this occasion, the bank's lending limit and Regulation O.

Q. Okay. So one of the factors in determining the amount of the civil monetary penalty is the defendant's conduct and whether or not it violated the law in the opinion of the comptroller?

A. Not—not really. I think that the inquiry initially is going to be whether or not they violated the law. I mean, that's—that's—if you don't have a violation of the law, you don't even consider a penalty. Then after—after you've decided there's a violation of law, then would you look at these factors which come out of the C.M.P. statute.

Q. Okay.

A. In determining gravity, we would look at things like the loss to the institutions, whether there was concealment—

Q. Willfulness?

A. Willfulness, certainly. Yeah. Good or bad faith.

[46] Q. Whether they'd acted in concert with others?

A. No.

Q. Okay. But at least willfulness and concealment would be factors; correct?

A. We would—we would consider a violation to be more serious if it was willful as opposed to being unintentional. Yes.

Q. All right. Now, with respect to concern—considering the gravity of the violation, there are some 13 factors that are at play according to the policy of the comptroller that existed in 1987.

A. There are—there are 13 factors that were set out in the F.F.I.A.C. policy statement of July 23rd, 1980, and we did take those into consideration.

Q. And those were some of which you've mentioned: willfulness, concealment.

But intent, was intent one of the factors that's considered?

A. I would have to see the policy, but I would think so.

Q. Okay. Now—now, in January of 1988, another policy was adopted—

A. Yes.

Q. —by the comptroller, part of which we've made reference to here; correct?

A. Yes.

Q. And there was placed into effect something called a [47] matrix, a civil monetary penalty matrix.

A. Yes, sir.

Q. And can you tell us what a civil monetary matrix is?

A. It was an attempt by the agency, in a non-scientific way, to provide some more concrete guidance to our examiners and people who were involved in the civil money penalty process as to the types of factors that are important in deciding whether to assess a penalty and the amount of weight that they should give to those factors.

Q. Well, in fact,trying to—trying to cut through some of this, the civil monetary penalty matrix was, in part, used as guidance to determine the amount of civil monetary penalty.

A. Oh, yeah. Yes.

Q. And there are some—a number of factors that go into the—the determination of amount as per the civil monetary penalty matrix; correct?

A. That is correct.

Q. And those factors are found on the fourth page of Government Exhibit 21; correct?

A. Yes. I'm looking at your—the Defense Exhibit Number 4, but I assume it's the same matrix.

Q. Okay, they are—they are the same, or at least I'll represent to you that they're the same.

A. Okay.

[48] Q. It's also attached, not in a filled-out fashion, to Government's Exhibit 21.

But anyway, this matrix, Defendants' Exhibit Number 4, or what's attached to Government's Exhibit 21, is used,

in part, at least to determine the amount of the civil monetary penalty.

A. It's a guide.

Q. Yes. It's a guide to determine the amount.

A. Yeah. I mean, it's—you know, when I say it's a guide, I guess what I'm getting at is we don't pretend that this is science and we're not wedded to it, but it's a guide.

Q. And I take it the reason you're saying that is because there's some exercise of judgment required before the civil monetary penalty is actually, in fact, assessed.

A. Yes.

Q. But the matrix is used as a guide in determining the amount?

A. Yes.

Q. And the factors that are used in the civil monetary penalty matrix are, and I won't bother to go through all of them, but willfulness, correct?

A. Yes.

Q. Insider?

A. Whether it's insider related. Yes.

Q. History?

[49] A. Yes.

Q. Loss?

A. Yes.

Q. Number of violations?

A. Yes.

Q. Duration of violations?

A. Yes.

Q. Concealment?

A. Yes.

Q. Impact?

A. Yes.

Q. Okay. And then I take it that what happens is that this is filled out in some form; is that not correct?

A. Yeah, at several stages. The examiner initially fills it out because it gives the examiner some guidance as to whether or not they have a violation that's serious

enough to consider further pursuing; it's also considered, you know, at the review level at the district office; and then finally by the attorney in Washington who is responsible for presenting the case to S.R.C.

Q. Let's take a moment to look at page 5 of Defendants' Exhibit Number 21.

A. Okay.

Q. Or Government Exhibit 21, which is the comptroller's policy on civil monetary penalties at January the 28th of 1988. Do [50] you have that in front of you?

A. Page 5 of the Government's Exhibit 21?

Q. Yes.

A. I show three pages, and then the matrix, and then the second page of the matrix.

Q. Do you have a last page that has a points—

A. Yeah.

Q. —reference to it?

A. Yes.

Q. Okay. And just for the record, that would be one, two, three, four,—well the fifth page.

A. Yes.

Q. Okay.

A. It doesn't say five on it, but that's correct.

Q. All right. The fifth page of the—of Government's Exhibit 21 has a—has columns, "Points," "Suggested Action," and "Responsibility"; correct?

A. It does.

Q. And the points are intended to reflect a score that's calculated on the mate—on the matrix; right?

A. Yes.

Q. And that translates into an amount of the fine—of the assessment or a guideline for the amount of the fine?

A. That's right.

Q. And was this matrix used in at least initially considering [51] how much money to assess against Mr. Hudson?

A. It was used by me, because I—I completed the one that's in the—in the books here.

Q. All right. Let's take a look at Defendant's Exhibit Number 4.

A. That—that's the matrix that I completed on Mr. Hudson.

Q. Okay. And you com—completed the—this civil monetary penalty matrix against Mr. Hudson pursuant to the policy that's set forth in Government's Exhibit 21; correct?

A. Yes.

Q. And you filled it all out and he like over a hundred points.

A. Yes, he did.

Q. And according to your policy, that would call for a fine of like a hundred thousand dollars.

A. Assessment of—consider assessment greater than a hundred thousand.

Q. Yeah. And that was determined on the basis, or at least you were given a guideline determination based upon the factors that are set out in the matrix.

A. That's correct.

Q. Now, and I guess it—it just so happened that that calculation worked out to be the same as Mrs. Cory's recommendation back in March of '88?

A. I—well, she recommnded a hundred thousand, and my [52] point total was off the scale, but I decided—my recommendation was a hundred thousand, as well.

Q. Right.

A. I thought her recommendation was appropriate.

Q. Now, you mentioned in your earlier testimony the supervisory review committee?

A. Yes, I did.

Q. What was the supervisory review committee?

A. It is a committee composed of senior agency officials who are responsible for making decisions of whether to pursue enforcement actions against banks and bankers.

Q. And you made a report to that committee; did you not?

A. I did.

Q. And that report is in exhibit 3, defendants' exhibit number 3, at Bates 114.

A. Yes.

Q. And on page 11 of that report, you set forth the factors you considered in assessing the civil monetary penalty; did you not?

If I misspoke, I apologize.

A. Yes.

Q. Page 11 of your memo that would be Bates Stamped 00124.

A. Yeath. I don't agree with that. Page 11 dosen't really address that. Page 13 does, where I talk about —the paragraph that starts, "the violations are extremely serious."

[53] Q. Well, your—your page 11 has a column, "civil money penalties"; does it not?

A. Yeah, but all I do there is recite the statute.

Q. Well, in the last sentence don't you say, "in determining the amount of the statutory penalty"?

A. I say what the statute requires.

Q. "—the O.C.C. is statutorily required to consider"?

A. Yeah.

Q. And is, in fact—aren't those the factors you considered in assessing the civil monetary penalty?

A. Oh, they were considered. Yes.

Q. Yeah. And then you go on to say, "in addition to the matrix."

A. Yes.

Q. Okay. And then you had a conclusion—you ended your memo with a conclusion; did you not?

A. I did.

Q. That expressed your objective, in part?

A. Yes.

Q. And you report to the supervisory review committee, and tell me if I don't read it correctly, that:

> "The Office of the Comptroller can accomplish a great deal by preventing these individuals from ever reentering the banking industry and, through publicity of these actions, hopefully deter other individuals from [54] similar conduct."

A. That's correct.

Q. And then you go on to say, "accordingly, a one-hundred-thousand-dollar fine is recommended," and then fines against the other two defendants; correct?

A. Yeah. That's accurate.

Q. Now, the F.D.I.C. in this case, the losses that you mentioned in regard to the banks, you understand Mr. Hudson did not agree that he caused losses to the banks?

A. Oh, I don't think he agreed. No.

Q. Yeah. And, in fact, the losses to the banks were born by the F.D.I.C. fund; correct?

A. The O.C.C. directed the banks to charge off the loans in question because they had no value. The losses, combined with other losses that the bank had incurred, rendered them insolvent, the and the F.D.I.C.—the institution was put into receivership and—by the F.D.I.C., who was charged with liquidating its assets.

Q. Okay. And when the assets were liquidated, was there some kind of deficiency?

A. I—I'm not—I don't work for the F.D.I.C., but my understanding, I think these banks were handled as a straight payout to the depositors. I don't believe anybody purchased the banks. And my reco- —my understanding is that the government—the F.D.I.C. has collected very little, if [55] anything, on the loans in question.

Q. Okay. But whatever—whatever the payout is, it —that was born by what they—the assets they liquidated and what was funded by the F.D.I.C.; correct?

A. No. The government insures deposits of up to a hundred thousand dollars. Because—the because the bank's capital was completely depleted, there was nothing here to pay off depositors.

Q. Okay.

Q. So the F.D.I.C. had to reach into the insurance fund to pay them off and then try to recover what it could by liquidating the assets.

Q. And isn't it true that the F.D.I.C. is funded by insurance premiums paid by the banks?

A. I think the insurance fund itself is funded that way. I don't know how the employees—I think the employees may be funded by congressional money.

Q. Okay. But the—at least in part, in fact, in large part, the F.D.I.C. is funded by insurance premiums paid by the banks?

A. The F.D.I.C. insurance fund is. If the fund became depleted, which it did not, then the taxpayers would foot the bill of.

Q. Yeah. And the insurance premiums, that's—that's not government money; is it?

[56] A. It is in the sense that it's turned over to the F.D.I.C., which is a government agency.

Q. Okay. But the source of the money is not from the government treasury; is it? It comes from the banks?

A. The source of any government money does not—comes from people and businesses.

Q. Well, I—

A. In my judgment it is government money. Yes.

Q. Well, okay, let me ask it this way: Isn't it true that the—that the banks pay insurance premiums which go into the F.D.I.C. fund?

A. Yes.

Q. Thank you.

CROSS-EXAMINATION (Continued)

BY MR. ROLFE:

Q. Mr. Stipano, just a copule of questions, and not to go back over everything that we've covered.

Other than, I think, some perceived differences in the degree of culpability with reference to Mr. Hudson, Baresel, and Rackley, did not treat this as one case and treat —treat these individuals and make your recommendations based on one investigation?

A. We did a single investigation. In deciding what actions were appropriate, we looked at each person individually.

Q. Okay. Was the same rationale, basically, used in your [57] judgment with reference to the actions you took?

A. I don't understand the question.

Q. The same—the same type of regulations, the matrix,—I don't want to go through the—all—everything—

A. Yes.

Q. —That Mr. Neville asked you.

A. Yes, sir. Yes, sir.

Q. Okay. I'm just asking these questions for purposes of the record, that, basically, everything you've said with reference to Mr. Hudson would pertain also to Mr. Baresel and Mr. Rackley with reference that the—the way you approached the investigation, the matrixes that were done with reference to their financial wherewithal, their culpability, the various things that went into their actions as you saw them, and I think it would be safe to say that Mr. Baresel did not agree that he caused the banks any losses either; did he?

A. I—again, there's owe a lot of questions in there.

I will say that I—I will not say that everything I said about Mr. Hudson applies to the others, as well, but what I would say is that my description of the O.C.C.'s policies and procedures, as applied to Mr. Hudson, were applied to the others, as well, and that Mr. Baresel, like the others, signed a stipulation and consent order without admitting or denying liability.

Q. Okay. And did you—did you have a chance to read Mrs. [58] Pritchett's affidavit?

A. I—I skimmed it and I read portions of it.

Q. Okay. And I believe you've commented on the—the parts that you have commented on with reference to Mr. Ogilvie's questions?

A. I made a comment concerning restitution.

MR. ROLFE: Okay. Thank you.

CROSS-EXAMINATION (Continued)

BY MR. GILE:

Q. Sir, if I asked you the same questions with regard to Mr. Rackley, would your answers be the same there also?

A. I will repeat what I said, which is that the same—my description of the policies and procedures of the O.C.C. as applied to Mr. Hudson were also applied to Mr. Rackley and Mr. Baresel.

Q. Would you agree with me that on Government's Exhibit 15, which is Mr. Rackley's February 6th, 1988, letter to Ms. Cory, that the financial statement attached thereto shows Mr. Rackley had a negative net worth of $230,990?

A. Yes, it does.

Q. Were you also aware that Mr. Rackley's—his sole profession, I believe since college, had been in the banking industry; had it not?

A. I know that he was a national bank examiner and then he worked in the banking industry.

[59] Q. Well, Mr.—he is different from Mr. Hudson and Br. Baresel in the regard they are also lawyers. You know that; do you not?

A. I am aware of that?

Q. Do you know of any other employment Mr. Rackley had except for banking since college?

A. Other than being a national bank examiner, no.

MR. GILE: Okay, thank you. That's all.

REDIRECT EXAMINATION

BY MR. OGILVIE:

Q. Mr. Stipano, would you look at the C.M.P. Matrix that is Defendants' Exhibit Number 4, please, the one you identified as having filled out.

A. Yeah. Okay.

Q. Do you recall when in the investigative process this was done?

A. This—this would have been completed shortly before going to the supervision review committee to present the findings of my investigation.

Q. And would this have been one of the—the items that you did—a task that you performed in making your recommendation to that committee?

A. Yeah, it would—it would be something that I would do in order to help formulate my recommendation.

Q. Could the S.R.C. have disagreed with the amount of civil [60] money penalty that you recommended?

A. Oh, yes.

Q. Who all else in the O.C.C., what kinds of persons would fill out a matrix like this?

A. Well, as I say, initially the—the examiner would do it. Now, in this case that didn't happen, because we were under the 1985 policy when Mr. Burch did the examinations, and also the reviewing attorney in the district would also do it, but I'm not a—I don't think that Ms. Cory did either for the same reason. If she did one, I—I don't have a recollection of her doing it. And then it would be filled out again by the attorney in the enforcement division that ultimately handles the case.

Q. Do you know whether or not the members of the supervisory review committee also fill out a matrix in helping them decide if they agree with our recommendation or not?

A. They don't—they don't fill one out. They will, typically, ask us if he filled one out and what the outcome was.

Q. You had mentioned in your testimony on direct before that there was a formal agreement in effect with respect to Hammon and Tipton; correct?

A. Yes.

Q. Could civil money penalty sanctions have been levied against these three defendants solely for violations of that agreement? Does the comptroller have that power, I mean?

[61] A. The comptroller has that power since passage of F.I.R.R.E.A. In this case, we—we could have—after F.I.R.R.EA. was passed, we could have assessed these individuals for violations of the formal agreement. Prior to F.I.R.R.E.A., we could not have.

Q. Prior to F.I.R.R.E.A., could the comptroller have made the same assessment against these three defendants if they had simply been negligent rather than willful?

A. No. We don't have the authority—our authority comes from if a person causes or brings about or participates in a violation of law or an unsafe or an unsound practice, we can assess a penalty. And by "violation of law," I mean banking—bank regulatory law. In fact,—

Q. I'm sorry. Go ahead.

A. —the law that was in effect at the time when these —when—that govern these transactions only provide that we could only assess penalties for violations of specific laws, and those laws were the National Bank Act, which are civil regulatory laws that apply to national banks, like the lending-limit statute; the Federal Reserve Act, which, again, are banking statutes that are administered primarily by Federal Reserve; and also for violations of cease—cease and desist orders. Those are the only types of things that we could assess penalties for at that time.

Q. You had also mentioned in your testimony, excuse me, there [62] was one C.M.P. policy that took effect in January of 1985; correct?

A. Yes.

Q. And that was superseded by one that took effect in January of 1988?

A. That's correct.

Q. Did Congress change the O.C.C.'s powers by statute during that period of time?

A. No.

Q. Would the O.C.C. still have the powers that it was delegated by Congress whether there was any policy in effect at any time?

A. Yes.

MR. OGILVIE: That's all I have of Mr. Stipano; Your Honor.

MR. NEVILLE: No questions, Your Honor.

MR. ROLFE: Nothing further, Your Honor.

MR. GILE: No questions.

THE COURT: Thank you. Please step down.

THE WITNESS: Thank you.

(Witness Excused)

THE COURT: Mr. Ogilvie?

MR. OGILVIE: Your Honor, I don't have any further testimony to offer the court.

I submit all of the Government's exhibits, being 1 through [63] 23, that we stipulated to earlier, and again I'll state that we stipulate to the admissibility for the court's consideration of all of the defendants exhibits, as well.

I don't have anything further of an evidentiary nature to offer the court. I have a suggestion concerning, perhaps, how—how we might proceed from here, if the court wouldn't mind my—my suggestion.

THE COURT: Before you make that suggestion, I'll be glad to hear it, plaintiff's Exhibit 1 through 24, inclusive, are admitted by stipulate without objection, and defendants' Exhibit 1 through 5, inclusive—

MR. NEVILLE: Yes, Your Honor.

THE COURT: —are also, on the same basis, admitted.

MR. OGILVIE: Your Honor, I see, at least from the Government's standpoint, that there are two fairly complicated legal issues that remain. One is whether these sanctions now, in light of the new evidence the court has received today, are punitive or remedial; and secondly, whether the actions by the O.C.C. encompass the same conduct as is mentioned in the indictment.

I recall from Your Honor's earlier ruling that that point was—was not decided by this court, and it's also mentioned in the Tenth Circuit's opinion as a finding that this court might have to determine.

[64] Because of the complexity of the—the legal principles that guide the resolution of both of those issues, my suggestion to the court would be to allow both parties a period of time to submit briefs in writing so that both sides can give this a more studied treatment than we could here in court today.

My suggestion, if the court would accommodate my schedule, since I am due to be out of town at a school next week, is to permit us two weeks from tomorrow in order to, perhaps, file simultaneous briefs on these two issues and any other issues that the court might wish to hear addressed by the parties.

Thank you, Your Honor.

Mr. NEVILLE: Your Honor, I have no objection or no problem with the suggestion by Mr. Ogilvie.

It might be helpful, and probably Mr. Marks might be overloaded, if we could have reference to the transcript, if the court thinks that that would be beneficial. I know we'd like to have—try to get a reference to the transcript before the briefing is done. We have no objection and no problem with that schedule.

I guess my question is, if that's agreeable with the court, and if so, are we talking simultaneous briefs, or how does the court wish us to proceed?

THE COURT: Well, let's talk about that.

Counsel for the defendants, are you in agreement with [65] that?

MR. ROLFE: Yes, Your Honor.

THE COURT: Mr. Gile?

MR. GILE: Yes, Your Honor.

THE COURT: My suggestion would be that we first consult with the court reporter to see what he can do to accommodate you.

The second would be whether the Government should file a brief, and I should think, for the court's purposes, it might be most useful to have, also, proposed findings of fact and conclusions of law, as we would do in a civil case, non-jury case, because, ultimately, this court must

make factual determinations and conclusions of law to satisfy the requirements of the opinion and order of the Court of Appeals. I believe, from my standpoint that would facilitate my work.

So since it is the Government's burden to establish the two findings on the two issues, wouldn't it be more orderly and in keeping with our usual procedures to have you file yours, Mr. Ogilvie, in proposed findings of fact and conclusions of law and a supporting trial brief, and then give the defendants the opportunity to respond to it. I don't think it matters much, and I think that we have a clear choice as between those two, that is, the sequential version or the simultaneous version, and I really don't care. I'm going to have to go through it anyway.

[66] What's your suggestion?

MR. OGILVIE: Your Honor, the only reason I suggested that briefs might be filed simultaneously is first, that in this hearing, unlike in many, I think the issues of fact and the issues of law are fairly well identified, since many of these issues have been addressed to this court in motions and responses before and because of the benefit of the Tenth Circuit Court's opinion. Because of those things, my suggestion was simultaneous briefs, because I gathered that we would probably all be in agreement as to what the issues are.

If the court would like for the Government to file its brief first and permit a response, I think that that would be perfectly appropriate also. I think that my concern was more the length of time to have an opportunity to do that, in a considered fashion, more so than forcing the defendants to reply to something they hadn't seen before.

THE COURT: Yes. Well, I—

MR. OGILVIE: If the court would be more inclined for me to file first and permit an opportunity for reply, I think that's appropriate also.

THE COURT: The only reason not to do that is simply it takes longer, and I know it's in everyone's inter-

est to keep the case moving and to make these determinations as soon as possible.

As I understand the testimony and the evidence, there's [67] not a lot of disagreement with regard to the factual issues. It's what those facts from the evidence constitute in contemplation of these two issues, under largely undisputed acts, whether it was punitive or solely remedial, and whether it was the same conduct to be applied.

Am I misreading this or misinterpreting it, or are we dealing with, largely, undisputed facts but hotly disputed characterizations of those facts?

MR. OGILVIE: I think that's very accurately stated, Your Honor.

MR. NEVILLE: I would agree with that, Your Honor, and I—I—the only reason I was—after hearing Mr. Ogilvie phrasing the issues, that I would prefer to go after his brief, respond to his brief, is I don't agree with exactly the issues that he's framed. We think the question before the court, setting aside the similar conduct or facts, is whether or not the Government's effort here was solely remedial. I didn't understand him exactly to say that when he postured what he viewed the issue to be. Therefore, I would prefer to respond to his brief.

THE COURT: Well, let's discuss that. Under the opinion of the Court of Appeals, must it not be solely remedial, Mr. Ogilvie? Do you have a copy of the opinion?

MR. OGILVIE: I do, Your Honor, and I'm examining the end of the court's opinion where I recalled that that statement [68] is made.

It does say that in the Court's opinion at the bottom of page 4, there must be a determination whether or not the fines are solely remedial.

THE COURT: That's the issue that I thought we were addressing.

MR. OGILVIE: I think I—I think we agree on what the issues are, although I may have phrased it in an inartful way.

THE COURT: Well, but let's be sure. That is the issue as defined by the Circuit's opinion?

MR. OGILVIE: I agree with that, Your Honor.

THE COURT: Well, if that's the case, Mr. Neville, is there any particular need or benefit to the defendants to respond rather than file simultaneous findings and briefs?

MR. NEVILLE: May I ask Mr. Rothbaum to address the court on that issue, Your Honor?

THE COURT: Yes.

MR. ROTHBAUM: Only on one point, Your Honor, the same conduct issue. This as a developing area after Halper. The same conduct issue in this case will encompass, for example, Section 93(b) the statute under which the comptroller acted here in comparison to the statutes on which the indictment has been brought. Section 93(b), in turn, encompasses all of Chapter 2 of Title 12, the National Bank Act.

[69] The only problem I see with the simultaneous brief is, without knowing the government's theory, our brief will, necessarily, be very abstract, will be a discussion of general principles of law.

THE COURT: I'm convinced, Mr. Rothbaum. Thank you.

I think that the whole goal here is to address these issues thoroughly and responsibly, and if it requires a little more investment of time, it won't be that much, and I think everyone will be better served if we invest that extra time and approach it in the sequential fashion.

So with that said, Mr. Ogilvie, when did you want your deadline to be?

MR. OGILVIE: Your Honor, I had originally asked for it to be two weeks from tomorrow. If it might—if it might be appropriate, perhaps the Court could tie the briefing schedule to the completion of the transcript by Mr. Marks. The Court, for example, might give the Government a certain amount of time after that event, whenever it might occur, and then the an appropriate response

time for the defendants after the submisison of the Government's brief or after that deadline.

THE COURT: All right, I think we'll do it this way. I'm going to recess the hearing if there's nothing further at this time. I'm going to give you gentlemen and Ms. Poarch the opportunity to speak with the court reporter to see what his schedule will permit to accommodate your needs. On that basis, [70] I'd like then to ask you to propose a briefing and submission schedule, and if it's reasonable, I'm going to approve it, and I know it will be. So talk to him, propose a schedule, and I'm sure I'll approve it, and we probably will not need to formally reconvene for that purpose.

Agreeable?

MR. OGILVIE: Yes,Your Honor.

MR. NEVILLE: Yes, Your Honor.

MR. ROLFE: Yes, sir.

THE COURT: We'll be in recess.

(Proceedings closed)

APPENDIX F

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 93-6117, 93-6123, and 93-6125

UNITED STATES OF AMERICA,
Plaintiff-Appelles,

v.

JOHN C. HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants-Appellants.

Jan. 24, 1994

Before KELLY, SETH, and GOODWIN *, Circuit Judges.

SETH, Circuit Judge.

Appellants John Hudson, Larry Baresel and Jack Rackley were indicted in August 1992 for criminal law violations of 18 U.S.C. §§ 2, 371, 656 and 1005 because of their alleged mismanagement and illegal operation of several banks. These violations were based on the same lending transactions which were the subject of prior administrative sanctions imposed against the Appellants by the Comptroller of the Currency ("OCC") for violations of various federal banking laws.

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* Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, sitting by designation.

Each Appellant moved to dismiss the indictment on double jeopardy grounds. The United States District Court for the Western District of Oklahoma consolidated and denied all three motions, and this appeal followed.

In early 1989 the OCC issued a "Notice of Assessment of a Civil Money Penalty" against the Appellants assessing civil penalties pursuant to 12 U.S.C. §§ 93(b) and 504 for alleged violations of 12 U.S.C. §§ 84 and 375b and 12 C.F.R. §§ 31.2(b) and 215.4(b). The OCC maintained that Appellants' violations caused approximately $900,000.00 in "losses". Appellant Hudson was ordered to pay $100,000.00, and Appellants Rackley and Baresel to pay $50,000.00 each. Payments were to be made to the Treasurer of the United States. Later in 1989 the OCC issued a "Notice of Intent to Prohibit Further Participation" ("Prohibition Order") to the Appellants, which sought to prevent the Appellants "from further participation, in any manner, in the conduct of the affairs of any insured depository institution." In essence, the OCC sought to prohibit Appellants from all banking activities.

As a result of the then pending OCC administrative proceedings, the Appellants entered into a Stipulation and Consent Order ("Consent Order") (October 1989) whereby Appellant Hudson consented to pay $16,500.00 and Appellants Rackley and Baresel consented to pay $15,000.00 each. The Appellants also agreed not to participate in most, if not all, banking activities unless they received prior written authorization from the OCC and the appropriate federal regulatory agency. In addition, the Consent Order at the end included a provision ("Waiver Provision") stating:

> "Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate."

The district court concluded that Appellants made a knowing, voluntary and intelligent waiver of their double jeopardy claim by signing the Consent Order. The district court also held, "upon review of the record", that the agreed upon fines and nonparticipation sanctions were "solely" remedial. Thus the conclusion that Appellants' double jeopardy claims must fail. By basing its decision on the foregoing, the court stated that it did not consider whether the "conduct" underlying the OCC sanctions and the indictment was the same.

The first issue to be considered is whether the Waiver Provision of the Consent Order effectively cut off Appellant's rights to raise the double jeopardy defense. We review the decision of the district court on this issue *de novo*. *Larson v. Tansy*, 911 F.2d 392 (10th Cir.). To be valid waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747. Moreover, because a fundamental constitutional right is at issue, we must subject the purported waiver to stringent scrutiny and "indulge every reasonable presumption against the loss of constitutional rights." *United States v. Geittmann*, 733 F.2d 1419, 1423 (10th Cir.) (quoting *Illinois v. Allen*, 397 U.S. 343, 90 S.Ct. 1057, 1060, 25 L.Ed.2d 353).

The pertinent language of the Waiver Provision provides that "nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States . . . to bring other actions. . . ." This language states that the Government does not waive its rights to institute further actions against Appellants. In fact, the

Government did precisely this by filing the indictment. Contrary to the Government's position, however, the provision's language cannot reasonably be interpreted as a waiver by Appellants of their constitutional rights to raise valid defenses to the indictment. If it was the Government's intent to have Appellants waive certain rights, the Government would have phrased the Waiver Provision in terms which clearly stated that Appellants were abandoning those rights so that they could have made a voluntary, intelligent and knowing waiver. We note in passing that Article III of the Consent Order explicitly enumerated various rights and interests that were expressly waived by Appellants and that this would have been the appropriate place to create a waiver of Appellants' double jeopardy rights.

The Government would have us rely on *United States v. Marcus Schloss & Co.*, 724 F.Supp. 1123 (S.D.N.Y.), in which the court held:

> "[T]he defendant in an SEC civil proceeding who, *with knowledge of a pending criminal inquiry*, enters into a consent order explicitly recognizing the absence of any bar to criminal proceedings arising out of the same conduct, cannot subsequently advance that civil disposition, even accompanied by monetary sanctions, as the basis for a claim of double jeopardy."

Id. at 1127 (emphasis added). The problem with the Government's reliance on *Marcus Schloss* is that there is no evidence in the record before us that Appellants had knowledge of any pending criminal proceedings or inquiries. Based on the record, we hold that the Waiver Provision's protection of the Government's right and authority to bring further actions does not operate as a valid waiver by Appellants of the double jeopardy defense. The most that can be said in view of the introductory words "Respondents understand" is that they could be sued.

The remaining issue on appeal is whether the district court correctly held that Appellants were not entitled to double jeopardy protection because both the nonparticipation and the money sanctions were not punishment. The standard of review of this issue is also *de novo. United States v. Sasser*, 974 F.2d 1544, 1549 (10th Cir.).

In addressing the parties' arguments relating to the punitive nature of the civil sanctions imposed, the district court correctly relied on the Supreme Court's decision in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487. As in *Halper*, we are concerned with the Double Jeopardy Clause's protection against multiple punishments for the same offense. Because it is indisputable that the pending criminal indictment seeks to punish the Appellants, we must determine whether the sanctions imposed pursuant to the Consent Order were "punishment" for purposes of double jeopardy analysis. The Court in *Halper* stated:

> "that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to to the sanction, that must be evaluated."

Halper, 490 U.S. at 447 n. 7, 109 S.Ct. at 1901 n. 7.

> "To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. . . .
>
> ". . . We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . [I]t follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either restrictive or deterrent purposes, is punishment,

> as we have come to understand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."

Id. at 448-49, 109 S.Ct. at 1902 (citations omitted).

Applicants contend that the above quoted language means that unless a sanction is "solely" remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in *Austin v. United States,* —— U.S. ——, 113 S.Ct. 2801, 125 L.Ed.2d 488.

In *Austin,* the Court addressed whether a civil forfeiture was punishment for purposes of the Eighth Amendment's Excessive Fines Clause. The Court noted that "sanctions frequently serve more than one purpose" *Id.* at ——-, 113 S.Ct. at 2802. However, even if a sanction is remedial, it is still subject to the Excessive Fines Clause if "it can only be explained as serving *in part* to punish." *Id.* (emphasis added). The Court went on to quote the *Halper* decision in support of its holding that the forfeiture was punishment because it did not serve "solely" remedial purposes. *Id.* at ——. 113 S.Ct. at 4816.

Furthermore. Appellants' proposition that a sanction should be considered punishment if it is not solely remedial is supported by common sense. That is to say, if a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished despite that fact that the sanction is also remedial. To conclude otherwise effectively invalidates the Double Jeopardy Clause by allowing multiple punishments for the same conduct merely because the punishments also serve remedial purposes. We therefore

must conclude that if a sanction is not exclusively remedial, but rather can only be explained as also affecting deterrence or retribution, it is punishment for double jeopardy analysis. We are careful to note that a determination that a sanction is at least in part punishment requires that it *must* be explained as also serving as a deterrent or retribution, not merely that it *may* be so explained.

Although *Halper* dealt with the scenario where civil sanctions were meted out after a criminal prosecution, we have recognized that a civil sanction's being exacted first does not alter the applicability of *Halper. United States v. Bizzell,* 921 F.2d 263 (10th Cir.).

The Nonparticipation Sanctions

The nonparticipation sanctions were agreed to by Appellants when they signed the Consent Order. The gist of these sanctions, which were premised on 12 U.S.C. § 1818 (e), (i), was that Appellants were indefinitely barred from any further banking activities until such time as they obtained the written consent of the OCC and other appropriate regulatory agencies to reenter the banking industry. The parties are primarily concerned with § 1818(e) which provides:

> (1) Authority to issue order. Whenever the appropriate Federal banking agency determines that—
>
> (A) any institution-affiliated party has, directly or indirectly—
>
> (i) violated—-
>
> (I) any law or regulation;
>
> (ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or
>
> . . . .

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)—

(i) such insured depository institution or busines institution has suffered or will probably suffer financial loss or other damages;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, or breach—

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution.

the agency may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

Although the Supreme Court has expressly refused to rely on statutory language as determinative of the remedial or punitive qualities of a sanction, *Halper*, 490 U.S. at 447, 109 S.Ct. at 1902 ("the labels 'criminal' and 'civil' are not a paramount importance"), "the Court did not

abandon earlier analytical framework used to determine whether a specific penalty provision may be characterized as remedial or punitive in a general sense." *United States v. WRW Corp.*, 986 F.2d 138, 140 (6th Cir.). With this in mind, Appellants argue that the express language of § 1818(e) coupled with its legislative history clearly demonstrate that the statute was intended to serve punitive goals. However, Appellants concede that § 1818(e) is also designed in part to protect the integrity of the banking system which promotes a remedial goal. While we agree that § 1818(e) may serve to punish individuals for, *inter alia*, violations of any law, it does not follow that all sanctions are necessarily presumed to be punitive when the express language, as conceded by Appellants, also allows for remedial sanctions.

We have previously addressed a similar sanction in *United States v. Bizzell*, 921 F.2d 263 (10th Cir.). In that case, the two defendants were charged by the Department of Housing and Urban Development ("HUD") with filing false statements and violating various HUD regulations. Ultimately, the defendant John Bizzell entered into a settlement agreement whereby he agreed to a two-year exclusion from HUD activities conditioned upon a payment of thirty thousand dollars. *Id.* at 265. Defendant Charles Bizzell signed a similar agreement not to participate for eighteen months. *Id.* Subsequently, defendants were indicted on numerous criminal violations related to their HUD activities. On appeal from the district court's denial of their motion for summary judgment based on double jeopardy, we hold that the "penalty of debarment is strictly remedial. . . . It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition." *Id.* at 267.

Similarly, the OCC's use of debarment as a means of protecting the integrity of the banking system and the

interests of the depositors is a legitimate remedial purpose that need not necessarily be defined as also serving as deterrence or retribution. Appellants attempt to distinguish *Bizzell* by arguing that they are barred for life as opposed to eighteen or twenty-four months. This distinction is unpersuasive because the Prohibition Order clearly states that they may again participate in banking activities if they obtain the proper consent.

Moreover, Appellants claim that the OCC's prohibition is punitive because there was a finding of scienter, i.e., that Appellants had violated a law of regulation through personal dishonesty. Again this fails because the finding by the OCC was that Appellants had "engaged in conduct or practice . . . which resulted in substantial financial loss or other damage. . . ." Prohibition Order, p. 1. The fact that Appellants' violations involved personal dishonesty is not dispositive. *See Bizzell,* 921 F.2d at 265 (defendants' sanctions based on filing false statements). While Appellants "may interpret debarment as punitive, and indeed feel as though they have been punished, debarment constitutes the 'rough remedial justice' permissible as a prophylactic governmental action." *Id.* at 267 (citation omitted).

Having reviewed the evidence surrounding Appellants' alleged misconduct and the subsequent Consent Order, we are convinced that the Government's nonparticipation sanction was solely designed to protect the integrity of the banking industry by purging the system of corrupt influences. We therefore hold that Appellants' revokable ban from further participation in banking activities is solely remedial even though it carries the sting of punishment in the eyes of Appellants.

The Money Sanctions

The prohibition sanctions were remedial, but what of the money sanctions? *Halper, Bizzell* and *WRW* addressed the situation where the sanctions allegedly exceeded the

actual damage caused by the various defendants. In the case presented herein, Appellants allegedly caused over $900,000.00 in losses, yet were originally fined $200,000.00, which was later reduced substantially by the Consent Order. From this the district court concluded:

> "It is not disputed by the defendants that 12 U.S.C. §§ 93 . . . [and 504] give the Comptroller authority to assess civil money penalties for violations. . . . As noted by the government:
>
> > "The amounts of money that may be assessed [under the statutes] is stated in terms of the number of days that each violation continues. In addition, both statutes require the OCC to take into account the financial resources and good faith of the person against whom sanctions are sought, the gravity of the violation, the history of previous violations, and any other factors that justice may require, in determining the appropriate sanction to impose.
>
> "The amounts of the agreed fines appear to be reasonable under the guidelines set forth in the statutes, and the statutes serve legitimate remedial goals."

Order, pgs. 5-6 (filed March 25, 1993) (citation omitted).

Our problem with this holding is that the district court determined only that "the statutes" are remedial. As we have stated, the fact that a statute may be remedial does not necessarily mean that sanctions imposed thereunder are solely remedial. We are also troubled by the absence of any declaration of what the precise remedial goals of the statutes are. Moreover, we disagree with the trial court's implied conclusion that the statutes are exclusively remedial because they authorize civil remedies which take into account various factors like history of violations, a party's financial resources and good faith, and the gravity of the violation. These factors are equally consistent with

a deterence determination. Thus the Government may employ these factors in order to exact an appropriate money sanction that will effectively deter a party from further wrongdoing.

Additionally, we recognize that the language of 12 U.S.C. § 504 closely parallels that of 12 U.S.C. § 93(b), and that both expressly permit civil sanctions. However, these sanctions are "money penalties" limited to a maximum of $1,000.00 per day of a continuing violation. Rather than remedying any particular loss, these statutes appear to be designed, at least in part, to punish and deter improper conduct. This is further exemplified by § 93(a) which provides that parties are personally liable for all damages caused by any knowing violations. On its face, this provision seems to remedy injured parties for losses incurred by the same conduct that is subjected to penalties pursuant to §§ 93(b) and 504.

We also conclude that the court's determination that the amounts of the fines were reasonable was without any factual support in the record. The court made no findings as to the actual losses incurred nor who may have suffered the losses, and how they compared to the sanctions imposed. In addition, even if they were reasonable, the sanctions could still be punitive. Merely because overly excessive fines may be deemed punitive, *see Halper*, 490 U.S. at 452, 109 S.Ct. at 1904, the converse is not necessarily true, i.e., a money sanction can be reasonably related to one's violations and still be used as punishment. We must therefore vacate the district court's holding concerning the money sanctions and remand for further proceedings.

In deciding whether or not the fines are solely remedial, the court must determine the precise injury caused to the Government for which the sanctions are the remedy. *See Halper*, 490 U.S. at 452, 109 S.Ct. at 1904 (on remand Government must provide accounting of actual losses). *See also* 12 U.S.C. §§ 93(b)(8) and 504(g) (monies

are to be paid to the United States Treasury). If there was no injury to be remedied, then presumably the fines were imposed to deter the Appellants from continued violations. If there was an injury, the court must determine if the fines were in fact intended solely to remedy the injury, which will include a determination whether they were reasonable. The "same conduct" issue may have to be decided. *See Burke v. Board*, 940 F.2d 1360 (10th Cir.), wherein the court decided that the two did not relate to the same offense.

Accordingly, the district court's holding on the waiver issue is REVERSED; its holding on the nonparticipation sanction issue is AFFIRMED; its decision on the money sanction issue is VACATED; and the case is REMANDED for further proceedings consistent with this opinion. IT IS SO ORDERED.

APPENDIX G

[Filed Mar. 25, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CR-92-152-T

UNITED STATES OF AMERICA,
Plaintiff,
v.
JOHN HUDSON, LARRY BARESEL, and
JACK BUTLER RACKLEY,
Defendants.

ORDER

Under consideration are the defendants' respective motions to dismiss the indictment on grounds of double jeopardy. All three defendants contend that the indictment violates the double jeopardy clause of the Fifth Amendment because civil penalties imposed by the Comptroller of the Currency constitute "punishment" and were imposed for the same offense or offenses for which the defendants now stand indicted. The government contests both the assertion that the civil penalties imposed constitute punishment and the assertion that they were imposed for the same offenses. For reasons set forth *infra*, the court concludes that the civil sanctions imposed were not "punishment" in the double jeopardy sense. Therefore, the issue of whether the offenses charged in the indictment are the same as those invoking the civil sanctions need not be addressed.

As to each defendant, the Comptroller of the Currency ("Comptroller") issued a "Notice of Assessment of a

Civil Money Penalty" on February 13, 1989 for alleged violations of 12 U.S.C. §§ 84, and 375(b), and 12 C.F.R. §§ 31.2(b) and 215.4(b). The amount of the assessment sought by the Comptroller as to the respective defendants was: (1) $100,000 assessed against John Hudson; (2) $50,000 assessed against Jack Butler Rackley, (3) $50,000 assessed against Larry Baresel.

The Comptroller also issued a "Notice of Intent to Prohibit Further Participation" to each defendant, which sought prohibition "from further participation, in any manner, in the conduct of the affairs of any insured depository institution." [1]

As a result of the civil proceedings, each defendant entered into a Stipulation and Consent Order.[2] The defendants consented to civil money penalties in the following amounts:

John Hudson	$16,500.00
Jack Rackley	$15,000.00
Larry Baresel	$15,000.00

The defendants also consented with respect to institutions and agencies set forth in the agreements,[3] that they would not:

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[1] *See* Brief in Support of Defendant Larry Baresel's Motion to Dismiss Indictment on Grounds of Double Jeopardy and Motion to Adopt Co-defendant's Plea of Double Jeopardy, Exhibit "B", p. 1; Brief in Support of Motion of Defendant Rackley to Dismiss Indictment on Grounds of Double Jeopardy, Att-2, p. 1; Brief of John Hudson in Support of Motion to Dismiss Indictment on Grounds of Double Jeopardy, Exhibit "Prohibition Notice," p. 1.

[2] *See* Brief in Support of Defendant Larry Baresel's Motion to Dismiss Indictment on Grounds of Double Jeopardy and Motion to Adopt Co-Defendant's Plea of Double Jeopardy, Exhibit "C"; Brief in Support of Motion of Defendant Rackley to Dismiss Indictment on Grounds of Double Jepardy, Att-3; Brief of John Hudson in Support of Motion to Dismiss Indictment on Grounds of Double Jeopardy, Exhibit [Stipulation and Consent Order].

[3] *Id.* at 2-4.

(a) participate in any manner in the conduct of their affairs;

(b) solicit, procure, transfer, attempt to transfer, vote or attempt to vote any proxy, consent, or authorization with respect to any voting rights;

(c) vote for a director, or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u) (as amended); or

(d) violate any voting agreement previously approved by the "appropriate federal banking agency," as defined in 12 U.S.C. § 1813(q) (as amended); . . .[4]

Also included in the Stipulation and Consent Order as to each defendant was a provision [5] stating:

> Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.

In analyzing the double jeopardy question, the court looks for guidance to the seminal United States Supreme Court case of *United States v. Halper*, 490 U.S. 435 (1989). In that case the Court stated "that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." *Id.* at 447 n.7. The assessment of whether or not a sanction constitutes criminal punishment is set forth as follows:

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[4] *Id.* at p. 3.

[5] *Id.* at p. 5.

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. . . . [T]he determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applies in the individual case serves the goals of punishment.
>
> These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. . . . We therefore hold that under the Double Jeopardy Clause a defendant . . . may not be subjected to an additional . . . sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 447-448.

Of course, in *Halper* the criminal prosecution occurred first, but its teaching is just as viable here. *See United States v. Sanchez-Escarcno*, 950 F.2d 193, 200 (5th Cir. 1991), *cert. denied*, —— U.S. ——, 113 S. Ct. 123 (1992) ("[T]he *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding."); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir. 1990), *cert. denied*, 498 U.S. 865 (1990) (order of proceedings, civil or criminal, does not affect double jeopardy application).

Upon review of the record, it is concluded that the non-participation agreement and the agreed fines were solely

remedial. The statute authorizing the Comptroller's actions demonstrates that it is intended to maintain the integriy of the banking system. 12 U.S.C. § 1818(c)(1)(B)(c) provides in pertinent part:

> (c) Removal and prohibition authority
>
> (1) Authority to issue order. Whenever the appropriate federal banking agency determines that—
>
> (A) . . .
>
> (B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)—
>
> (i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;
>
> (ii) the interest of the insured depository institution's depositors have been or could be prejudiced;
>
> (iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and
>
> (C) such violation, practice or breach—
>
> (i) involves personal dishonesty on the part of such party; or
>
> (ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,
>
> the agency may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

The court is satisfied that the agreed civil sanctions serve the legitimate governmental purpose of protecting the integrity of the banking system, and that they are remedial. While the defendants find the sanctions harsh, it is not their subjective perception that is dispositive, but rather, it is the objective purpose of the statute that counts. As is pointed out in *Halper*, 490 U.S. at 447 n.7: "This is not to say that whether a sanction constitutes punishment must be determined from the defendant's perspective. On the contrary, our cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment."

The same is, of course, true as respects the agreed money penalties. It is not disputed by the defendants that 12 U.S.C. §§ 93, 503 give the Comptroller authority to assess civil money penalties for violations. It is reiterated here that each defendant agreed to the assessment made. As noted by the government:

> The amounts of money that may be assessed [under the statutes] is stated in terms of the number of days that each violation continues. In addition, both statutes require the OCC to take into account the financial resources and good faith of the person against whom sanctions are sought, the gravity of the violation, the history of previous violations, and any other factors that justice may require, in determining the appropriate sanction to impose.

Government's Consolidated Response to Defendants' Motion to Dismiss Indictment on Grounds of Double Jeopardy, p. 10. The amounts of the agreed fines appear to be reasonable under the guidelines set forth in the statutes, and the statutes serve legitimate remedial goals. That is, civil money penalties are to be fashioned in such a way as to preclude a finding of penalty. Both statutes tie penalties to the numbers of days that violations continue, and are designed to promote the ends which the regulations seek to achieve.

In *United States v. Bizzell*, 921 F.2d 263, 267 n.5 (10th Cir. 1990), the circuit court noted respecting John Bizzell's civil money penalty that "in agreeing that the settlement did not prevent the Justice Department from pursuing criminal sanctions, Mr. Bizzell must have recognized the remedial nature of the payment." The same would be true of the defendants in this case. Moreover, the government contends that the defendants waived any double jeopardy argument based on the civil proceeding by agreeing that the civil proceedings did not constitute "a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate." *See* n.5, *supra.*

The court believes this provision, in and of itself, is sufficient evidence of a knowing, voluntary and intelligent waiver of any argument that the current indictment seeks a proscribed multiple punishment. *See generally United States v. Broce*, 781 F.2d 792 (10th Cir. 1986). *See also United States v. Marcus Schloss & Co., Inc.*, 724 F. Supp. 1123, 1127 (S.D.N.Y. 1989) ("I hold that the defendant in an SEC civil proceeding who, with knowledge of a pending criminal inquiry, enters into a consent order explicitly recognizing the absence of any bar to criminal proceedings arising out of the same conduct, cannot subsequently advance the civil disposition, even accompanied by monetary sanctions, as the basis for a claim of double jeopardy.").

These conclusions make unnecessary comparison of the civil complaint and indictment for purposes of determining whether the same conduct was involved.

Accordingly, the motions to dismiss the indictments on double jeopardy grounds, filed by all defendants, are deemed wholly without merit, and they are DENIED.

IT IS SO ORDERED this 25th day of March, 1993.

/s/ [Illegible]
United States District Judge

APPENDIX H

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

NOTICE OF ASSESSMENT OF A CIVIL MONEY PENALTY

To: John Hudson, Jack B. Rackley and Larry Baresel, formerly of the First National Bank of Tipton, Tipton, Oklahoma, and the First National Bank of Hammon, Hammon, Oklahoma

The Comptroller of the Currency of the United States of America (Comptroller) hereby assesses civil money penalties against John Hudson, Jack B. Rackley and Larry Baresel (Respondents), pursuant to the provisions of 12 U.S.C. §§ 93(b) and 504. These assessments are issued on the basis of the hereinafter described violations of 12 U.S.C. §§ 84, 375b and 12 C.F.R. §§ 31.2(b) and 215.4(b) which occurred at the First National Bank of Tipton, Tipton, Oklahoma (Tipton), and the First National Bank of Hammon, Hammon, Oklahoma (Hammon).

After taking into account the size of the financial resources and the good faith of Respondents, the gravity of the violations, the history of previous violations and other matters as justice may require, as required by 12 U.S.C. §§ 93(b)(2) and 504(b), and after soliciting and giving full consideration to Respondents' views with respect to these considerations, the Comptroller hereby assesses against Respondent Hudson a penalty of one hundred thousand dollars ($100,000), and against Respondents Rackley and Baresel penalties of fifty thousand dollars ($50,000) each, payable to the Treasurer of the United States.

These assessments are based on the following:

ARTICLE I

(1) Tipton and Hammon were national banking associations, chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended (12 U.S.C. § 1 *et seq.*).

(2) At all times relevant to the violations described below, Respondent Hudson was participating in the conduct of Tipton's and Hammon's affairs, Respondent Rackley was Tipton's president and a director at Hammon, and Respondent Baresel was a director at Tipton and Hammon. In their capacities as officers and directors, Respondents Rackley and Baresel were under a statutory and fiduciary duty to supervise Tipton's and Hammon's affairs in accordance with all applicable laws, rules and regulations.

ARTICLE II

(1) In the early 1980's Respondent Hudson became the chairman of the board and controlling shareholder of Tipton and Hammon, as well as the First State Bank, Blanchard, Oklahoma (Blanchard), the First State Bank, Granite, Oklahoma (Granite) and the First State Bank, Willow, Oklahoma (Willow), all of which have failed. In July 1983, Respondent Hudson borrowed approximately $8.4 million from MBank, Dallas, Texas (MBank) to refinance his ownership of these institutions. The notes were secured by the banks' stock, as well as other collateral.

(2) In 1984, Tipton's and Hammon's boards of directors, including Respondent Hudson, executed formal agreements with the OCC. The formal agreements addressed problems in the lending area and required the correction and prevention of violations of law.

(3) On or about June 11, 1986, Tipton made a $25,010 loan to Respondent Hudson. On or about June 27, 1986, Tipton made a $75,010 loan to Respondent Hudson.

(4) On or about March 8, 1984, Hammon made a $25,000 loan to Respondent Hudson. On or about December 31, 1985, Hammon made a $75,020 loan to Respondent Hudson.

(5) The OCC's examinations of Tipton and Hammon in 1986 disclosed numerous insider violations involving Respondent Hudson, and areas of noncompliance with the formal agreements. The September 30, 1986 Report of Supervisory Activity of Tipton (1986 Tipton ROSA) cited the bank for violations of 12 U.S.C. §§ 375a and 375b, and 12 C.F.R. § 31.2. The September 30, 1968 Report of Supervisory Activity of Hammon (1986 Hammon ROSA) cited the bank for violations of 12 U.S.C. § 375a and 12 C.F.R. § 31.2. The details of these violations are specifically set forth in the 1986 Tipton ROSA and the 1986 Hammon ROSA, which are incorporated herein by reference the same as if fully set forth.

(6) In 1986, Respondent Hudson defaulted on his bank stock loans at MBank. On August 8, 1986, Respondent Hudson resigned as a director of Tipton. Respondent Hudson also resigned as a director of Hammon during the September 30, 1986 examination and was replaced by Respondent Rackley. In October 1986, Rackley became Tipton's president.

(7) In the fall of 1986, Respondent Hudson contacted Claude Cypert, an Oklahoma businessman, to solicit his interest in representing a group of investors known as Macao Investment Company (Macao) who were allegedly interested in purchasing Respondent Hudson's bank stock notes at MBank. Macao's corporate records indicate that Respondent Hudson is Macao's president and a major shareholder. Respondent Hudson did not disclose the name of the group or his involvement in it to Cypert. In exchange for an option to purchase a five percent interest in Tipton and Hammon, and a bus to be donated to the Southern Nazarene University, Cypert agreed to represent the group in its dealings with MBank.

(8) On or about December 1, 1986, Respondent Hudson and MBank entered into a settlement agreement whereby MBank was given the right to sell the bank stock securing Respondent Hudson's notes. The settlement agreement provided that after the sale of the bank stock, Respondent Hudson would be liable to MBank for any deficiency up to $2.75 million. The agreement further provided that Respondent Hudson would sell his interest in Blanchard to his father-in-law, Jack Marshall, and resign as a director of all the banks and their holding companies.

(9) In December 1986, MBank agreed to sell Tipton and Hammon notes, with an underlying interest in the bank stock, to Cypert for $400,000. The deal was scheduled for closing on December 30, 1986 in Dallas.

(10) Between December 29 and 31, 1986, Tipton, Hammon and Blanchard made a total of eight unsecured loans to various nominee borrowers listed under subparagraphs (a)-(h) below. Except where noted, the proceeds of these loans, totaling $540,000, were deposited in an account of SKL, Inc. (SKL) at the Century National Bank, Oklahoma City, Oklahoma (Century). $400,000 of the proceeds were subsequently transferred by cashier's check to Macao. The remaining $140,000 was transferred back to Tipton, along with the proceeds of a $60,000 loan from Hammon to Hurley Financial Corporation (Hurley), to reimburse Tipton for $100,000 loans to Hurley and SKL which were not booked. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $20,000 loan from Tipton to Respondent Rackley on or about December 29, 1986;

(b) $90,000 loan from Tipton to SKL on or about December 30, 1986;

(c) $100,000 loan from Tipton to Hurley on or about December 3, 1986 (not booked);

(d) $100,000 loan from Tipton to SKL on or about December 30, 1986 (not booked);

(e) $90,000 loan from Hammon to Respondent Rackley on or about December 31, 1986 (only $40,000 was deposited in SKL's account at Century);

(f) $90,000 loan from Hammon to SKL on or about December 31, 1986;

(g) $60,000 loan from Hammon to Hurley on or about December 31, 1986 (proceeds were transferred back to Tipton, to partially reimburse the bank for the $100,000 loans to Hurley and SKL which were not booked);

(h) $100,000 loan from Blanchard to SKL on or about December 29, 1986.

(11) The loans set forth in paragraph (10) above were made on the basis of virtually no credit information or other documentation from the borrowers. Respondent Rackley was the loan officer for all the nominee loans at Tipton and Hammon, except for the loans to himself. As directors, Respondents Rackley and Baresel approved the loans at Tipton and Hammon, although Respondent Rackley abstained from voting on his own notes.

(12) On or about December 30, 1986, Respondent Baresel delivered a $400,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon and Blanchard set forth in paragraph (10) above. Cypert exchanged the cashier's check from Macao for his own $400,000 cashier's check payable to MBank and, on December 30, flew to Dallas with Respondent Baresel where they met with MBank officials. Cypert exchanged the $400,000 cashier's check for the Tipton and Hammon notes and underlying stock interest. Shortly thereafter, Cypert assigned his interest in the notes and stock to

Macao and gave the assignment, notes and stock to Respondent Baresel.

(13) In February 1987, MBank agreed to sell the Willow and Granite notes, with an underlying interest in the bank stock, some additional corporate stock and a real estate mortgage held as collateral, to Cypert for $750,000. The deal was scheduled for closing on February 27, 1987 in Dallas.

(14) Between February 23 and 27, 1987, Tipton, Hammon, Blanchard and the First National Bank of Del City, Del City, Oklahoma (Del City) made a total of ten unsecured loans to various borrowers listed under subparagraphs (a)-(j) below. Except where noted, the proceeds of these loans, totaling $520,000, were deposited in SKL's account at Century and subsequently transferred by cashier's check to Macao. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $60,000 loan from Tipton to Tom Lucas on or about February 23, 1987;

(b) $93,000 loan from Tipton to Jack Marshall on or about February 24, 1987 (only $65,351 was deposited in SKL's account at Century; the remaining $27,649 was used to make a payment on one of Respondent Hudson's loans at the Peoples State Bank, Claremore, Oklahoma (Peoples));

(c) $30,000 loan from Tipton to David Tuck on or about February 25, 1987;

(d) $92,000 loan from Hammon to Jack Marshall on or about February 24, 1987 (only $64,649 was deposited in SKL's account at Century; the remaining $27,351 was used to make a payment on one of Respondent Hudson's loans at Peoples);

(e) $20,000 loan from Hammon to David Tuck on or about February 27, 1987;

(f) $10,000 loan from Hammon to Sharon Matthews on or about February 27, 1987;

(g) $40,000 loan from Blanchard to Tom Lucas on or about February 26, 1987;

(h) $60,000 loan from Blanchard to Respondent Rackley on or about February 26, 1987;

(i) $100,000 loan from Blanchard to Partridge Capital Corp., on or about February 26, 1987;

(j) $70,000 loan from Del City to SKL on or about February 25, 1987.

(15) In addition to the loans set forth in paragraph (14) above, Tipton made a $50,000 loan to H.H. Clifford on or about February 25, 1987. The proceeds of this loan were transferred to Executive Bank Management Services, Inc., a company controlled by Respondent Hudson. Respondent Hudson used the proceeds to purchase a $50,000 cashier's check payable to Macao.

(16) Tipton also made a $90,000 loan to Cypert on or about February 19, 1987, and Hammon made a $90,000 loan to Cypert on or about February 27, 1987.

(17) The loans set forth in paragraphs (14) through (16) above were made on the basis of virtually no credit information or other documentation from the borrowers. Respondent Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the $92,000 loan from Hammon to Jack Marshall. As directors, Respondents Rackley and Baresel approved the loans at Tipton and Hammon, although Respondent Rackley abstained from voting on his own notes.

(18) On or about February 27, 1987, Respondent Baresel delivered a $570,000 cashier's check from Macao,

payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon, Blanchard and Del City set forth in paragraphs (14) and (15) above. Cypert exchanged the $570,000 cashier's check and the proceeds of the two $90,000 loans from Tipton and Hammon for a $750,000 cashier's check payable to MBank. On February 27, 1987, Cypert and Respondent Baresel flew to Dallas where they again met with MBank officials. Cypert exchanged the $750,000 cashier's check for the Willow and Granite notes, underlying stock interests, and assignment of the real estate mortgage. At the request of Respondents Hudson and Baresel, Cypert reassigned the real estate mortgage to Blanchard where it was used to provide security for one of Respondent Hudson's loans.

(19) Respondent Hudson directly benefited from the nominee loans at Tipton and Hammon that were used to purchase his bank stock notes at MBank. Respondent Hudson also directly benefited from the portions of the Jack Marshall loans from Tipton and Hammon that were used to make a payment on one of his loans at Peoples. Those loans are therefore attributable to him for lending limit purposes pursuant to 12 C.F.R. § 32.5(a)(1). At Tipton, the $2[illegible],000 advance to Respondent Rackley on December 29, 1986, when combined with Respondent Hudson's existing advances, first caused the line to exceed the bank's legal lending limit set forth at 12 U.S.C. § 84(a)(1). Total advances attributable to Respondent Hudson equaled $533,020 at Tipton, which exceeded the lending limit by $437,509. At Hammon, the $60,000 advance to Hurley and the $90,000 advances to SKL and Respondent Rackley on December 31, 1986, when combined with Respondent Hudson's existing advances, first caused the line to exceed the bank's lending limit. Total advances attributable to Respondent Hudson equaled $502,020 at Hammon, which exceeded the lending limit by $407,792.

(20) The nominee loans at Tipton and Hammon are also attributable to Respondent Hudson for purposes of 12 U.S.C. § 375b, and 12 C.F.R. §§ 31.2(b) and 215.4(b), pursuant to 12 U.S.C. §§ 31.3 and 215.3(f). At Tipton, the loans to Clifford, Cypert, Lucas, Marshall, SKL and Tuck were made at a time when Respondent Hudson's aggregate indebtedness exceeded five percnt of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2 (b)(1) and 215.4(b)(1)(i). At Hammon, the loans to Cypert, Marshall, Matthews and Tuck were made at a time when Respondent Hudson's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4 (b)(1)(i).

(21) The violations set forth in paragraphs (19) and (20) above were uncorrected at the close of the May 31, 1987 examination of Tipton and the June 30, 1987 examination of Hammon. The violations resulted in losses of approximately $456,000 at Tipton and $437,000 at Hammon. The losses contributed to the banks' failures on September 3, 1987. Further details of the violations are specifically set forth in the Report of Supervisory Activity of Tipton dated May 31, 1987 (1987 Tipton ROSA) and the Report of Supervisory Activity of Hammon dated June 30, 1987 (1987 Hammon ROSA). The 1987 Tipton ROSA and 1987 Hammon ROSA are incorporated herein by reference the same as if fully set forth.

WHEREFORE, the Comptroller, through his authorized representative whose hand appears below, hereby assesses the above-described penalties, effective immediately.

TAKE NOTICE, Respondents are hereby afforded the opportunity for a hearing before the Comptroller concerning these assessments, pursuant to 12 U.S.C. §§ 93(b)(3) and 504(c), *if a request for such a hearing is made within*

ten (10) days after service of this Notice of Assessment. Any request for such hearing shall be filed with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219, and such hearing shall be conducted pursuant to 12 C.F.R. § 19.23 which requires Respondents to file an answer to this Notice of Assessment.

If Respondents fail to request a hearing within the above ten (10) day period, these assessments shall constitute final and unappealable orders against them, pursuant to 12 U.S.C. §§ 93(b)(3) and 504(c).

Remittance of these civil money penalties shall be payable to the Treasurer of the United States and delivered to the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219.

Please note that, pursuant to 12 C.F.R. § 7.5217(b), the banks may not pay any civil money penalty or expenses or other payments, including legal fees, incurred with respect to the civil money penalty actions against the Respondents and the Respondents may not seek such reimbursement.

Pursuant to 12 C.F.R. § 19.10(c), the Comptroller may, in his discretion, order that a public hearing be held if he determines that it is necessary to protect the public interest. Respondents are hereby afforded an opportunity to submit their views as to whether a public hearing would be in the public interest in this case.

IN WITNESS WHEREOF, my hand this 13 day of Feb., 1989.

/s/ Dean S. Marriott
DEAN S. MARRIOTT
Senior Deputy Comptroller
for Bank Supervision

APPENDIX I

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

IN THE MATTER OF JOHN HUDSON
FIRST NATIONAL BANK OF TIPTON, TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON,
HAMMON, OKLAHOMA

NOTICE OF INTENTION TO PROHIBIT
FURTHER PARTICIPATION

To: John Hudson, formerly of the First National Bank of Tipton, Tipton, Oklahoma, and the First National Bank of Hammon, Hammon, Oklahoma

TAKE NOTICE, that on the 2nd day of October, 1989, a hearing will commence at 10:00 a.m. in the United States Courthouse for the Western District of Oklahoma, Oklahoma City, Oklahoma, pursuant to the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818(e), (i) concerning the charges set forth herein to determine whether an Order should be issued against John Hudson (Respondent) prohibiting him from further participation, in any manner, in the conduct of the affairs of any insured-depository institution.

After examination and investigation into the affars of the First National Bank of Tipton, Tipton, Oklahoma (Tipton) and the First National Bank of Hammon, Hammon, Oklahoma (Hammon), the Comptroller of the Currency of the United States of America (Comptroller) is

of the opinion that Respondent has engaged in conduct or practice with respect to such banks which resulted in substantial financial loss or other damage, has evidenced his personal dishonesty and a willful and continuing disregard for such banks' safety and soundness and, in addition, has evidenced his unfitness to participate, in any manner, in the conduct of the affairs of any depository institution.

THEREFORE TAKE NOTICE of the Comptroller's intention to prohibit Respondent from further participation, in any manner, in the conduct of the affairs of any insured depository institution, pursuant to 12 U.S.C. § 1818(e), (i). In support of this Notice of Intention to Prohibit Further Participation (Notice), the Comptroller charges the following:

ARTICLE I

(1) Tipton and Hammon were national banking associations, chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended (12 U.S.C. § 1 *et seq.*).

(2) At all times relevant to the violations described below, Respondent was participating in the conduct of Tipton's and Hammon's affairs.

(3) Tipton and Hammon were declared insolvent by the Comptroller on September 3, 1987. The Comptroller has jurisdiction to issue this Notice under 12 U.S.C. § 1818(i)(3), which provides the Comptroller with authority to prohibit an individual who has become separated from a national banking association from participating in the affairs of any depository institution.

ARTICLE II

(1) In the early 1980's, Respondent became the chairman of the board and controlling shareholder of Tipton and Hammon, as well as the First State Bank, Blanchard,

Oklahoma (Blanchard), the First State Bank, Granite, Oklahoma (Granite) and the First State Bank, Willow, Oklahoma (Willow), all of which have failed. In July 1983, Respondent borrowed approximately $8.4 million from MBank, Dallas, Texas (MBank) to refinance his ownership of these institutions. The notes were secured by the banks' stock, as well as other collateral.

(2) In 1984, Tipton's and Hammon's boards of directors, including Respondent, executed formal agreements with the OCC. The formal agreements addressed problems in the lending area and required the correction and prevention of violations of law.

(3) On or about June 11, 1986, Tipton made a $25,010 loan to Respondent. On or about June 27, 1986, Tipton made a $75,010 loan to Respondent.

(4) On or about March 8, 1984, Hammon made a $25,000 loan to Respondent. On or about December 31, 1985, Hammon made a $75,020 loan to Respondent.

(5) The OCC's examinations of Tipton and Hammon in 1986 disclosed numerous insider violations involving Respondent, and areas of noncompliance with the formal agreements. The September 30, 1986 Report of Supervisory Activity of Tipton (1986 Tipton ROSA) cited the bank for violations of 12 U.S.C. §§ 375a and 375b, and 12 C.F.R. § 31.2. The September 30, 1986 Report of Supervisory Activity of Hammon (1986 Hammon ROSA) cited the bank for violations of 12 U.S.C. § 375a and 12 C.F.R. § 31.2. The details of these violations are specifically set forth in the 1986 Tipton ROSA and the 1986 Hammon ROSA, which are incorporated herein by reference the same as if fully set forth.

(6) In 1986, Respondent defaulted on his bank stock loans at MBank. On August 8, 1986, Respondent resigned as a director of Tipton. Respondent also resigned as a director of Hammon during the September 30, 1986

examination and was replaced by Jack B. Rackley. In October 1986, Rackley became Tipton's president.

(7) In the fall of 1986, Respondent contacted Claud Cypert, an Oklahoma businessman, to solicit his interest in representing a group of investors known as Macao Investment Company (Macao) who were allegedly interested in purchasing Respondent's bank stock notes at MBank. Macao's corporate records indicate that Respondent is Macao's president and a major shareholder. Respondent did not disclose the name of the group or his involvement in it to Cypert. In exchange for an option to purchase a five percent interest in Tipton and Hammon, and a bus to be donated to the Southern Nazarene University, Cypert agreed to represent the group in its dealings with MBank.

(8) On or about December 1, 1986, Respondent and MBank entered into a settlement agreement whereby MBank was given the right to sell the bank stock securing Respondent's notes. The settlement agreement provided that after the sale of the bank stock, Respondent would be liable to MBank for any deficiency up to $2.75 million. The agreement further provided that Respondent would sell his interest in Blanchard to his father-in-law, Jack Marshall, and resign as a director of all the banks and their holding companies.

(9) In December 1986, MBank agreed to sell the Tipton and Hammon notes, with an underlying interest in the bank stock, to Cypert for $400,000. The deal was scheduled for closing on December 30, 1986 in Dallas.

(10) Between December 29 and 31, 1986, Tipton, Hammon and Blanchard made a total of eight unsecured loans to various nominee borrowers listed under subparagraphs (a)-(h) below. Except where noted, the proceeds of these loans, totaling $540,000, were deposited in an account of SKL, Inc. (SKL) at the Century National Bank, Oklahoma City, Oklahoma (Century). $400,000

of the proceeds were subsequently transferred by cashier's check to Macao. The remaining $140,000 was transferred back to Tipton, along with the proceeds of a $60,000 loan from Hammon to Hurley Financial Corporation (Hurley), to reimburse Tipton for $100,000 loans to Hurley and SKL which were not booked. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $20,000 loan from Tipton to Rackley on or about December 29, 1986;

(b) $90,000 loan from Tipton to SKL on or about December 30, 1986;

(c) $100,000 loan from Tipton to Hurley on or about December 30, 1986 (not booked);

(d) $100,000 loan from Tipton to SKL on or about December 30, 1986 (not booked);

(e) $90,000 loan from Hammon to Rackley on or about December 31, 1986 (only $40,000 was deposited in SKL's account at Century);

(f) $90,000 loan from Hammon to SKL on or about December 31, 1986;

(g) $60,000 loan from Hammon to Hurley on or about December 31, 1986 (proceeds were transferred back to Tipton, to partially reimburse the bank for the $100,000 loans to Hurley and SKL which were not booked);

(h) $100,000 loan from Blanchard to SKL on or about December 29, 1986.

(11) The loans set forth in pragraph (10) above were made on the basis of virtually no credit information or other documentation from the borrowers. Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the loans to himself. As directors,

Rackley and Larry Baresel approved the loans at Tipton and Hammon, although Rackley abstained from voting on his own notes.

(12) On or about December 30, 1986, Baresel delivered a $400,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon and Blanchard set forth in paragraph (10) above. Cypert exchanged the cashier's check from Macao for his own $400,000 cashier's check payable to MBank and, on December 30, flew to Dallas with Baresel where they met with MBank officials. Cypert exchanged the $400,000 cashier's check for the Tipton and Hammon notes and underlying stock interest. Shortly thereafter, Cypert assigned his interest in the notes and stock to Macao and gave the assignment, notes and stock to Baresel.

(13) In February 1987, MBank agreed to sell the Willow and Granite notes, with an underlying interest in the bank stock, some additional corporate stock and a real estate mortgage held as collateral, to Cypert for $750,000. The deal was scheduled for closing on February 27, 1987 in Dallas.

(14) Between February 23 and 27, 1987, Tipton, Hammon, Blanchard and the First National Bank of Del City, Del City, Oklahoma (Del City) made a total of ten unsecured loans to various borrowers listed under subparagraphs (a)-(j) below. Except where noted, the proceeds of these loans, totaling $520,000, were deposited in SKL's account at Century and subsequently transferred by cashier's check to Macao. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $60,000 loan from Tipton to Tom Lucas on or about February 23, 1987;

(b) $93,000 loan from Tipton to Jack Marshall on or about February 24, 1987 (only $65,351 was

deposited in SKL's account at Century; the remaining $27,649 was used to make a payment on one of Respondent's loans at the Peoples State Bank, Claremore, Oklahoma (Peoples));

(c) $30,000 loan from Tipton to David Tuck on or about February 25, 1987;

(d) $92,000 loan from Hammon to Jack Marshall on or about February 24, 1987 (only $64,649 was deposited in SKL's account at Century; the remaining $27,351 was used to make a payment on one of Respondent's loans at Peoples);

(e) $20,000 loan from Hammon to David Tuck on or about February 27, 1987;

(f) $10,000 loan from Hammon to Sharon Matthews on or about February 27, 1987;

(g) $40,000 loan from Blanchard to Tom Lucas on or about February 26, 1987;

(h) $60,000 loan from Blanchard to Rackley on or about February 26, 1987;

(i) $100,000 loan from Blanchard to Partridge Capital Corp., on or about February 26, 1987;

(j) $70,000 loan from Del City to SKL on or about February 25, 1987.

(15) In addition to the loans set forth in paragraph (14) above, Tipton made a $50,000 loan to H.H. Clifford on or about February 25, 1987. The proceeds of this loan were transferred to Executive Bank Management Services, Inc., a company controlled by Respondent. Respondent used the proceeds to purchase a $50,000 cashier's check payable to Macao.

(16) Tipton also made a $90,000 loan to Cypert on or about February 19, 1987, and Hammon made a $90,000 loan to Cypert on or about February 27, 1987.

(17) The loans set forth in paragraphs (14) through (16) above were made on the basis of virtually no credit information or other documentation from the borrowers. Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the $92,000 loan from Hammon to Jack Marshall. As directors, Rackley and Baresel approved the loans at Tipton and Hammon, although Rackley abstained from voting on his own notes.

(18) On or about February 27, 1987, Baresel delivered a $570,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon, Blanchard and Del City set forth in paragraphs (14) and (15) above. Cypert exchanged the $570,000 cashier's check and the proceeds of the two $90,000 loans from Tipton and Hammon for a $750,000 cashier's check payable to MBank. On February 27, 1987, Cypert and Baresel flew to Dallas where they again met with MBank officials. Cypert exchanged the $750,000 cashier's check for the Willow and Granite notes, underlying stock interests, and assignment of the real estate mortgage. At the request of Respondent and Baresel, Cypert reassigned the real estate mortgage to Blanchard where it was used to provide security for one of Respondent's loans.

(19) Respondent directly benefited from the nominee loans at Tipton and Hammon that were used to purchase his bank stock notes at MBank. Respondent also directly benefited from the portions of the Jack Marshall loans from Tipton and Hammon that were used to make a payment on one of his loans at Peoples. Those loans are therefore attributable to him for lending limit purposes pursuant to 12 C.F.R. § 32.5(a)(1). At Tipton, the $20,000 advance to Rackley on December 29, 1986, when combined with Respondent's existing advances, first caused the line to exceed the bank's legal lending limit set forth at 12 U.S.C. § 84(a)(1). Total advances attributable to Respondent equaled $533,020 at Tipton, which

exceeded the lending limit by $437,509. At Hammon, the $60,000 advance to Hurley and the $90,000 advances to SKL and Rackley on December 31, 1986, when combined with Respondent's existing advances, first caused the line to exceed the bank's lending limit. Total advances attributable to Respondent equaled $502,020 at Hammon, which exceeded the lending limit by $407,792.

(20) The nominee loans at Tipton and Hammon are also attributable to Respondent for purposes of 12 U.S.C. § 375b, and 12 C.F.R. §§ 31.2(b) and 215.4(b), pursuant to 12 U.S.C. §§ 31.3 and 215.3(f). At Tipton, the loans to Clifford, Cypert, Lucas, Marshall, SKL and Tuck were made at a time when Respondent's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i). At Hammon, the loans to Cypert, Marshall, Matthews and Tuck were made at a time when Respondent's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i).

(21) The violations set forth in paragraphs (19) and (20) above were uncorrected at the close of the May 31, 1987 examination of Tipton and the June 30, 1987 examination of Hammon. The violations resulted in losses of approximately $456,000 at Tipton and $437,000 at Hammon. The losses contributed to the banks' failures on September 3, 1987. Further details of the violations are specifically set forth in the Report of Supervisory Activity of Tipton dated May 31, 1987 (1987 Tipton ROSA) and the Report of Supervisory Activity of Hammon dated June 30, 1987 (1987 Hammon ROSA). The 1987 Tipton ROSA and 1987 Hammon ROSA are incorporated herein by reference the same as if fully set forth.

ARTICLE III

(1) The actions of Respondent described in Article II, paragraphs (1) through (21) above demonstrate that Respondent has engaged in conduct or practice with respect to Tipton and Hammon which resulted in substantial financial loss or other damage, has evidenced his personal dishonesty and a willful and continuing disregard for such banks' safety and soundness and, in addition, has evidenced his unfitness to participate, in any manner, in the conduct of the affairs of any insured depository institution.

THEREFORE, Respondent is directed to file an answer in writing to the charges contained herein with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219, within twenty (20) days from the date of service of this Notice, in accordance with 12 C.F.R. Part 19.

Pursuant to 12 U.S.C. § 1818(h)(1) and 12 C.F.R. § 19.10(c), the Comptroller may, in his discretion, order that a public hearing be held if he determines that it is necessary to protect the public interest. Respondent is hereby afforded an opportunity to submit his views as to whether a public hearing would be in the public interest in this case.

WITNESS, my hand on behalf of the Office of the Comptroller of the Currency, given at Washington, D.C. the 31st day of August, 1989.

/s/ Dean S. Marriott
DEAN S. MARRIOTT
Senior Deputy Comptroller
for Bank Supervision

APPENDIX J

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

IN THE MATTER OF LARRY BARESEL
FIRST NATIONAL BANK OF TIPTON, TIPTON, OKLAHOMA,
FIRST NATIONAL BANK OF HAMMON,
HAMMON, OKLAHOMA

NOTICE OF INTENTION TO
PROHIBIT FURTHER PARTICIPATION

To: Larry Baresel, formerly of the First National Bank of Tipton, Tipton, Oklahoma, and the First National Bank of Hammon, Hammon, Oklahoma

TAKE NOTICE, that on the 2nd day of October, 1989, a hearing will commence at 10:00 a.m. in the United States Courthouse for the Western District of Oklahoma, Oklahoma City, Oklahoma, pursuant to the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818(e), (i) concerning the charges set forth herein to determine whether an Order should be issued against Larry Baresel (Respondent) prohibiting him from further participation, in any manner, in the conduct of the affairs of any insured depository institution.

After examination and investigation into the affairs of the First National Bank of Tipton, Tipton, Oklahoma (Tipton) and the First National Bank of Hammon, Hammon, Oklahoma (Hammon), the Comptroller of the Currency of the United States of America (Comptroller) is of the opinion that Respondent has committed violations

of law and engaged in unsafe and unsound practices at such banks which resulted in substantial financial loss or other damage and serious prejudice to the interests of the depositors. The Comptroller has further determined that the violations and practices involve personal dishonesty on Respondent's part and demonstrate a willful and continuing disregard for the banks' safety and soundness.

THEREFORE TAKE NOTICE of the Comptroller's intention to prohibit Respondent from further participation, in any manner, in the conduct of the affairs of any insured depository institution, pursuant to 12 U.S.C. § 1818(e), (i). In support of this Notice of Intention to Prohibit Further Participation (Notice), the Comptroller charges the following:

ARTICLE I

(1) Tipton and Hammon were national banking associations, chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended (12 U.S.C. § 1 *et seq.*).

(2) At all times relevant to the violations described below, Respondent was a director of Tipton and Hammon. In his capacity as a director, Respondent was under a statutory and fiduciary duty to supervise the banks' affairs in accordance with all applicable laws, rules and regulations.

(3) Tipton and Hammon were declared insolvent by the Comptroller on September 3, 1987. The Comptroller has jurisdiction to issue this Notice under 12 U.S.C. § 1818(i)(3), which provides the Comptroller with authority to prohibit an individual who has become separated from a national banking association from participating in the affairs of any depository institution.

ARTICLE II

(1) In the early 1980's, John Hudson became the chairman of the board and controlling shareholder of

Tipton and Hammon, as well as the First State Bank, Blanchard, Oklahoma (Blanchard), the First State Bank, Granite, Oklahoma (Granite) and the First State Bank, Willow, Oklahoma (Willow), all of which have failed. In July 1983, Hudson borrowed approximately $8.4 million from MBank, Dallas, Texas (MBank) to refinance his ownership of these institutions. The notes were secured by the banks' stock, as well as other collateral.

(2) In 1984, Tipton's and Hammon's boards of directors, including Hudson, executed formal agreements with the OCC. The formal agreements addressed problems in the lending area and required the correction and prevention of violations of law.

(3) On or about June 11, 1986, Tipton made a $25,010 loan to Hudson. On or about June 27, 1986, Tipton made a $75,010 loan to Hudson.

(4) On or about March 8, 1984, Hammon made a $25,000 loan to Hudson. On or about December 31, 1985, Hammon made a $75,020 loan to Hudson.

(5) The OCC's examinations of Tipton and Hammon in 1986 disclosed numerous insider violations involving Hudson, and areas of noncompliance with the formal agreements. The September 30, 1986 Report of Supervisory Activity of Tipton (1986 Tipton ROSA) cited the bank for violations of 12 U.S.C. §§ 375a and 375b, and 12 C.F.R. § 31.2. The September 30, 1986 Report of Supervisory Activity of Hammon (1986 Hammon ROSA) cited the bank for violations of 12 U.S.C. § 375a and 12 C.F.R. § 31.2. The details of these violations are specifically set forth in the 1986 Tipton ROSA and the 1986 Hammon ROSA, which are incorporated herein by reference the same as if fully set forth.

(6) In 1986, Hudson defaulted on his bank stock loans at MBank. On August 8, 1986, Hudson resigned as a director of Tipton. Hudson also resigned as a director of Hammon during the September 30, 1986 examination and

was replaced by Jack B. Rackley. In October 1986, Rackley became Tipton's president.

(7) In the fall of 1986, Hudson contacted Claud Cypert, an Oklahoma business, to solicit his interest in representing a group of investors known as Macao Investment Company (Macao) who were allegedly interested in purchasing Hudson's bank stock notes at MBank. Macao's corporate records indicate that Hudson is Macao's president and a major shareholder. Hudson did not disclose the name of the group or his involvement in it to Cypert. In exchange for an option to purchase a five percent interest in Tipton and Hammon, and a bus to be donated to the Southern Nazarene University, Cypert agreed to represent the group in its dealings with MBank.

(8) On or about December 1, 1986, Hudson and MBank entered into a settlement agreement whereby MBank was given the right to sell the bank stock securing Hudson's notes. The settlement agreement provided that after the sale of the bank stock, Hudson would be liable to MBank for any deficiency up to $2.75 million. The agreement further provided that Hudson would sell his interest in Blanchard to his father-in-law, Jack Marshall, and resign as a director of all the banks and their holding companies.

(9) In December 1986, MBank agreed to sell the Tipton and Hammon notes, with an underlying interest in the bank stock, to Cypert for $400,000. The deal was scheduled for closing on December 30, 1986 in Dallas.

(10) Between December 29 and 31, 1986, Tipton, Hammon and Blanchard made a total of eight unsecured loans to various nominee borrowers listed under subparagraphs (a)-(h) below. Except where noted, the proceeds of these loans, totaling $540,000, were deposited in an account of SKL, Inc. (SKL) at the Century National Bank, Oklahoma City, Oklahoma (Century). $400,000 of the proceeds were subsequently transferred by cashier's check to Macao. The remaining $140,000 was transferred

back to Tipton, along with the proceeds of a $60,000 loan from Hammon to Hurley Financial Corporation (Hurley), to reimburse Tipton for $100,000 loans to Hurley and SKL which were not booked. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $20,000 loan from Tipton to Rackley on or about December 29, 1986;

(b) $90,000 loan from Tipton to SKL on or about December 30, 1986;

(c) $100,000 loan from Tipton to Hurley on or about December 30, 1986 (not booked);

(d) $100,000 loan from Tipton to SKL on or about December 30, 1986 (not booked);

(e) $90,000 loan from Hammon to Rackley on or about December 31, 1986 (only $40,000 was deposited in SKL's account at Century);

(f) $90,000 loan from Hammon to SKL on or about December 31, 1986;

(g) $60,000 loan from Hammon to Hurley on or about December 31, 1986 (proceeds were transferred back to Tipton, to partially reimburse the bank for the $100,000 loans to Hurley and SKL which were not booked;

(h) $100,000 loan from Blanchard to SKL on or about December 29, 1986.

(11) The loans set forth in paragraph (10) above were made on the basis of virtually no credit information or other documentation from the borrowers. Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the loans to himself. As directors, Rackley and Respondent approved the loans at Tipton and Hammon, although Rackley abstained from voting on his own notes.

(12) On or about December 30, 1986, Respondent delivered a $400,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon and Blanchard set forth in paragraph (10) above. Cypert exchanged the cashier's check from Macao for his own $400,000 cashier's check payable to MBank and, on December 30, flew to Dallas with Respondent where they met with MBank officials. Cypert exchanged the $400,000 cashier's check for the Tipton and Hammon notes and underlying stock interest. Shortly thereafter, Cypert assigned his interest in the notes and stock to Macao and gave the assignment, notes and stock to Respondent.

(13) In February 1987, MBank agreed to sell the Willow and Granite notes, with an underlying interest in the bank stock, some additional corporate stock and a real estate mortgage held as collateral, to Cypert for $750,000. The deal was scheduled for closing on February 27, 1987 in Dallas.

(14) Between February 23 and 27, 1987, Tipton, Hammon, Blanchard and the First National Bank of Del City, Del City, Oklahoma (Del City) made a total of ten unsecured loans to various borrowers listed under subparagraphs (a)-(j) below. Except where noted, the proceeds of these loans, totaling $520,000, were deposited in SKL's account at Century and subsequently transferred by cashier's check to Macao. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $60,000 loan from Tipton to Tom Lucas on or about February 23, 1987;

(b) $93,000 loan from Tipton to Jack Marshall on or about February 24, 1987 (only $65,351 was deposited in SKL's account at Century; the remaining $27,649 was used to make a payment on one of Hudson's loans at the Peoples State Bank, Claremore, Oklahoma (Peoples));

(c) $30,000 loan from Tipton to David Tuck on or about February 25, 1987;

(d) $92,000 loan from Hammon to Jack Marshall on or about February 24, 1987 (only $64,649 was deposited in SKL's account at Century; the remaining $27,351 was used to make a payment on one of Hudson's loans at Peoples');

(e) $20,000 loan from Hammon to David Tuck on or about February 27, 1987;

(f) $10,000 loan from Hammon to Sharon Matthews on or about February 27, 1987;

(g) $40,000 loan from Blanchard to Tom Lucas on or about February 26, 1987;

(h) $60,000 loan from Blanchard to Rackley on or about February 26, 1987;

(i) $100,000 loan from Blanchard to Partridge Capital Corp., on or about February 26, 1987;

(j) $70,000 loan from Del City to SKL on or about February 25, 1987.

(15) In addition to the loans set forth in paragraph (14) above, Tipton made a $50,000 loan to H.H. Clifford on or about February 25, 1987. The proceeds of this loan were transferred to Executive Bank Management Services, Inc., a company controlled by Hudson. Hudson used the proceeds to purchase a $50,000 cashier's check payable to Macao.

(16) Tipton also made a $90,000 loan to Cypert on or about February 19, 1987, and Hammon made a $90,000 loan to Cypert on or about February 27, 1987.

(17) The loans set forth in paragraphs (14) through (16) above were made on the basis of virtually no credit information or other documentation from the borrowers. Rackley was the loan officer for all of the nominee loans at Tipton and Hammon, except for the $92,000 loan from

Hammon to Jack Marshall. As directors, Rackley and Respondent approved the loans at Tipton and Hammon, although Rackley abstained from voting on his own notes.

(18)On or about February 27, 1987, Respondent delivered a $570,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon, Blanchard and Del City set forth in paragraphs (14) and (15) above. Cypert exchanged the $570,000 cashier's check and the proceeds of the two $90,000 loans from Tipton and Hammon for a $750,000 cashier's check payable to MBank. On February 27, 1987, Cypert and Respondent flew to Dallas where they again met with MBank officials. Cypert exchanged the $750,000 cashier's check for the Willow and Granite notes, underlying stock interests, and assignment of the real estate mortgage. At the request of Hudson and Respondent, Cypert reassigned the real estate mortgage to Blanchard where it was used to provide security for one of Hudson's loans.

(19) Hudson directly benefited from the nominee loans at Tipton and Hammon that were used to purchase his bank stock notes at MBank. Hudson also directly benefited from the portions of the Jack Marshall loans from Tipton and Hammon that were used to make a payment on one of his loans at Peoples. Those loans are therefore attributable to him for lending limit purposes pursuant to 12 C.F.R. § 32.5(a)(1). At Tipton, the $20,000 advance to Rackley on December 29, 1986, when combined with Hudson's existing advances, first caused the line to exceed the bank's legal lending limit set forth at 12 U.S.C. § 84(a)(1). Total advances attributable to Hudson equaled $533,020 at Tipton, which exceeded the lending limit by $437,509. At Hammon, the $60,000 advance to Hurley and the $90,000 advances to SKL and Rackley on December 31, 1986, when combined with Hudson's existing advances, first caused the line to exceed the bank's lending limit. Total advances attributable to Hudson

equaled $52,020 at Hammon, which exceeded the lending limit by $407,792.

(20) The nominee loans at Tipton and Hammon are also attributable to Hudson for purposes of 12 U.S.C. § 375b, and 12 C.F.R. §§ 31.2(b) and 215.4(b), pursuant to 12 U.S.C. §§ 31.3 and 215.3(f). At Tipton, the loans to Clifford, Cypert, Lucas, Marshall, SKL and Tuck were made at a time when Hudson's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i). At Hammon, the loans to Cypert, Marshall, Matthews and Tuck were made at a time when Hudson's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i).

(21) The violations set forth in paragraphs (19) and (20) above were uncorrected at the close of the May 31, 1987 examination of Tipton and the June 30, 1987 examination of Hammon. The violations resulted in losses of approximately $456,000 at Tipton and $437,000 at Hammon. The losses contributed to the banks' failures on specifically set forth in the Report of Supervisory Activity September 3, 1987. Further details of the violations are of Tipton dated May 31, 1987 Tipton ROSA and the Report of Supervisory Activity of Hammon dated June 30, 1987 (1987 Hammon ROSA). The 1987 Tipton ROSA and 1987 Hammon ROSA are incorporated herein by reference the same as if fully set forth.

ARTICLE III

(1) The actions of Respondent described in Article II, paragraphs (1) through (21) above demonstrate that Respondent has committed violations of law and unsafe and unsound practices at Tipton and Hammon which resulted in substantial financial loss or other damage to the banks

and serious prejudice to depositors' interests. The violations and practices involve personal dishonesty on Respondent's part and demonstrate a willful and continuing disregard for such banks' safety and soundness.

THEREFORE, Respondent is directed to file an answer in writing to the charges contained herein with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219, within twenty (20) days from the date of service of this Notice, in accordance with 12 C.F.R. Part 19.

Pursuant to 12 U.S.C. § 1818(h)(1) and 12 C.F.R. § 19.10(c), the Comptroller may, in his discretion, order that a public hearing be held if he determines that it is necessary to protect the public interest. Respondent is hereby afforded an opportunity to submit his views as to whether a public hearing would be in the public interest in this case.

WITNESS, my hand on behalf of the Office of the Comptroller of the Currency, given at Washington, D.C. the 31st day of August, 1989.

/s/ Dean S. Marriott
DEAN S. MARRIOTT
Senior Deputy Comptroller
for Bank Supervision

APPENDIX K

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF
THE CURRENCY

IN THE MATTER OF JACK B. RACKLEY
FIRST NATIONAL BANK OF TIPTON, TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON,
HAMMON, OKLAHOMA

NOTICE OF INTENTION TO PROHIBIT
FURTHER PARTICIPATION

To: Jack B. Rackley, formerly of the First National Bank of Tipton, Tipton, Oklahoma, and the First National Bank of Hammon, Hammon, Oklahoma

TAKE NOTCE, that on the 2nd day of October, 1989, a hearing will commence at 10:00 a.m. in the United States Courthouse for the Western District of Oklahoma, Oklahoma City, Oklahoma, pursuant to the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818(e), (i) concerning the charges set forth herein to determine whether an Order should be issued against Jack B. Rackly (Respondent) prohibiting him from further participation, in any manner, in the conduct of the affairs of any insured depository institution.

After examination and investigation into the affairs of the First National Bank of Tipton, Tipton, Oklahoma (Tipton) and the First National Bank of Hammon, Hammon, Oklahoma (Hammon), the Comptroller of the Currency of the United States of America (Comptroller) is of the opinion that Respondent has committed violations of law and engaged in unsafe and unsound practices at such

banks which resulted in substantial financial loss or other damage and serious prejudice to the interests of the depositors. The Comptroller has further determined that the violations and practices involve personal dishonesty on Respondent's part and demonstrate a willful and continuing disregard for the banks' safety and soundness.

THEREFORE TAKE NOTICE of the Comptroller's intention to prohibit Respondent from further participation, in any manner, in the conduct of the affairs of any insured depository institution, pursuant to 12 U.S.C. § 1818(e), (i). In support of this Notice of Intention to Prohibit Further Participation (Notice), the Comptroller charges the following:

ARTICLE I

(1) Tipton and Hammon were national banking associations, chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended (12 U.S.C. § 1 *et seq.*).

(2) At all times relevant to the violations described below, Respondent was president and a director of Tipton, and a director of Hammon. In his capacity as an officer and director. Respondent was under a statutory and fiduciary duty to supervise the banks' affairs in accordance with all applicable laws, rules and regulations.

(3) Tipton and Hammon were declared insolvent by the Comptroller on September 3, 1987. The Comptroller has jurisdiction to issue this Notice under 12 U.S.C. § 1818(i)(3), which provides the Comptroller with authority to prohibit an individual who has become separated from a national banking association from participating in the affairs of any depository institution.

ARTICLE II

(1) In the early 1980's, John Hudson became the chairman of the board and controlling shareholder of

Tipton and Hammon, as well as the First State Bank, Blanchard, Oklahoma (Blanchard), the First State Bank, Granite, Oklahoma (Granite) and the First State Bank, Willow, Oklahoma (Willow), all of which have failed. In July 1983, Hudson borrowed approximately $8.4 million from MBank, Dallas, Texas (MBank) to refinance his ownership of these institutions. The notes were secured by the banks' stock, as well as other collateral.

(2) In 1984, Tipton's and Hammon's boards of directors, including Hudson, executed formal agreements with the OCC. The formal agreements addressed problems in the lending area and required the correction and preventions of law.

(3) On or about June 11, 1986, Tipton made a $25,010 loan to Hudson. On or about June 27, 1986, Tipton made a $75,010 loan to Hudson.

(4) On or about March 8, 1984, Hammon made a $25,000 loan to Hudson. On or about December 31, 1985, Hammon made a $75,020 loan to Hudson.

(5) The OCC's examinations of Tipton and Hammon in 1986 disclosed numerous insider violations involving Hudson, and areas of noncompliance with the formal agreements. The September 30, 1986 Report of Supervisory Activity of Tipton (1986 Tipton ROSA) cited the bank for violations of 12 U.S.C. §§ 375a and 375b, and 12 C.F.R. § 31.2. The September 30, 1986 Report of Supervisory Activity of Hammon (1986 Hammon ROSA) cited the bank for violations of 12 U.S.C. § 375a and 12 C.F.R. § 31.2. The details of these violations are specifically set forth in the 1986 Tipton ROSA and the 1986 Hammon ROSA, which are incorporated herein by reference the same as if fully set forth.

(6) In 1986, Hudson defaulted on his bank stock loans at MBank. On August 8, 1986, Hudson resigned as a director of Tipton. Hudson also resigned as a director of Hammon during the September 30, 1986 examination and

was replaced by Respondent. In October 1986, Respondent. In October 1986, Respondent became Tipton's president.

(7) In the fall of 1986, Hudson contacted Claud Cypert, an Oklahoma businessman, to solicit his interest in representing a group of investors known as Macao Investment Company (Macao) who were allegedly interested in purchasing Hudson's bank stock notes at MBank. Macao's corporate records indicate that Hudson is Macao's president and a major shareholder. Hudson did not disclose the name of the group or his involvement in it to Cypert. In exchange for an option to purchase a five percent interest in Tipton and Hammon, and a bus to be donated to the Southern Nazarene University, Cypert agreed to represent the group in its dealings with MBank.

(8) On or about December 1, 1986, Hudson and MBank entered into a settlement agreement whereby MBank was given the right to sell the bank stock securing Hudson's notes. The settlement agreement provided that after the sale of the bank stock, Hudson would be liable to MBank for any deficiency up to $2.75 million. The agreement further provided that Hudson would sell his interest in Blanchard to his father-in-law, Jack Marshall, and resign as a director of all the banks and their holding companies.

(9) In December 1986, MBank agreed to sell the Tipton and Hammon notes, with an underlying interest in the bank stock, to Cypert for $400,000. The deal was scheduled for closing on December 30, 1986 in Dallas.

(10) Between December 29 and 31, 1986, Tipton, Hammon and Blanchard made a total of eight unsecured loans to various nominee borrowers listed under subparagraphs (a)-(h) below. Except where noted, the proceeds of these loans, totaling $540,000, were deposited in an account of SKL, Inc. (SKL) at the Century National Bank, Oklahoma City, Oklahoma (Century). $400,000

of the proceeds were subsequently transferred by cashier's check to Macao. The remaining $140,000 was transferred back to Tipton, along with the proceeds of a $60,000 loan from Hammon to Hurley Financial Corporation (Hurley), to reimburse Tipton for $100,000 loans to Hurley and SKL which were not booked. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $20,000 loan from Tipton to Respondent on or about December 29, 1986;

(b) $90,000 loan from Tipton to SKL on or about December 30, 1986;

(c) $100,000 loan from Tipton to Hurley on or about December 30, 1986 (not booked);

(d) $100,000 loan from Tipton to SKL on or about December 30, 1986 (not booked);

(e) $90,000 loan from Hammon to Respondent on or about December 31, 1986 (only $40,000 was deposited in SKL's account at Century);

(f) $90,000 loan from Hammon to SKL on or about December 31, 1986;

(g) $60,000 loan from Hammon to Hurley on or about December 31, 1986 (proceeds were transferred back to Tipton, to partially reimburse the bank for the $100,000 loans to Hurley and SKL which were not booked);

(h) $100,000 loan from Blanchard to SKL on or about December 29, 1986.

(11) The loans set forth in paragraph (10) above were made on the basis of virtually no credit information or other documentation from the borrowers. Respondent was the loan officer for all of the nominee loans at Tipton and Hammon, except for the loans to himself. As directors,

Respondent and Larry Baresel approved the loans at Tipton and Hammon, although Respondent abstained from voting on his own notes.

(12) On or about December 30, 1986, Baresel delivered a $400,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon and Blanchard set forth in paragraph (10) above. Cypert exchanged the cashier's check from Macao for his own $400,000 cashier's check payable to MBank and, on December 30, flew to Dallas with Baresel where they met with MBank officials. Cypert exchanged the $400,000 cashier's check for the Tipton and Hammon notes and underlying stock interest. Shortly thereafter, Cypert assigned his interest in the notes and stock to Macao and gave the assignment, notes and stock to Baresel.

(13) In February 1987, MBank agreed to sell the Willow and Granite notes, with an underlying interest in the bank stock, some additional corporate stock and a real estate mortgage held as collateral, to Cypert for $750,000. The deal was scheduled for closing on February 27, 1987 in Dallas.

(14) Between February 23 and 27, 1987, Tipton, Hammon, Blanchard and the First National Bank of Del City, Del City, Oklahoma (Del City) made a total of ten unsecured loans to various borrowers listed under subparagraphs (a)-(j) below. Except where noted, the proceeds of these loans, totaling $520,000, were deposited in SKL's account at Century and subsequently transferred by cashier's check to Macao. The amounts, granting banks, borrowers' names and dates of the nominee loans are as follows:

(a) $60,000 loan from Tipton to Tom Lucas on or about February 23, 1987;

(b) $93,000 loan from Tipton to Jack Marshall on or about February 24, 1987 (only $65,351 was

deposited in SKL's account at Century; the remaining $27,649 was used to make a payment on one of Hudson's loans at the Peoples State Bank, Claremore, Oklahoma (Peoples));

(c) $30,000 loan from Tipton to David Tuck on or about February 25, 1987;

(d) $92,000 loan from Hammon to Jack Marshall on or about February 24, 1987 (only $64,649 was deposited in SKL's account at Century; the remaining $27,351 wasu sed to make a payment on one of Hudson's loans at Peoples);

(e) $20,000 loan from Hammon to David Tuck on or about February 27, 1987;

(f) $10,000 loan from Hammon to Sharon Matthews on or about February 27, 1987;

(g) $40,000 loan from Blanchard to Tom Lucas on or about February 26, 1987;

(h) $60,000 loan from Blanchard to Respondent on or about February 26, 1987;

(i) $100,000 loan from Blanchard to Partridge Capital Corp., on or about February 26, 1987;

(j) $70,000 loan from Del City to SKL on or about February 25, 1987.

(15) In addition to the loans set forth in paragraph (14) above, Tipton made a $50,000 loan to H.H. Clifford on or about February 25, 1987. The proceeds of this loan were transferred to Executive Bank Management Services, Inc., a company controlled by Hudson. Hudson used the proceeds to purchase a $50,000 cashier's check payable to Macao.

(16) Tipton also made a $90,000 loan to Cypert on or about February 19, 1987, and Hammon made a $90,000 loan to Cypert on or about February 27, 1987.

(17) The loans set forth in paragraphs (14) through (16) above were made on the basis of virtually no credit information or other documentation from the borrowers. Respondent was the loan officer for all of the nominee loans at Tipton and Hammon, except for the $92,000 loan from Hammon to Jack Marshall. As directors, Respondent and Baresel approved the loans at Tipton and Hammon, although Respondent abstained from voting on his own notes.

(18) On or about February 27, 1987, Baresel delivered a $570,000 cashier's check from Macao, payable to Cypert. The check represented the proceeds of the nominee loans made at Tipton, Hammon, Blanchard and Del City set forth in paragraphs (14) and (15) above. Cypert exchanged the $570,000 cashier's check and the proceeds of the two $90,000 loans from Tipton and Hammon for a $750,000 cashier's check payable to MBank. On February 27, 1987, Cypert and Baresel flew to Dallas where they again met with MBank officials. Cypert exchanged the $750,000 cashier's check for the Willow and Granite notes, underlying stock interests, and assignment of the real estate mortgage. At the request of Hudson and Baresel, Cypert reassigned the real estate mortgage to Blanchard where it was used to provide security for one of Hudson's loans.

(19) Hudson directly benefited from the nominee loans at Tipton and Hammon that were used to purchase his bank stock notes at MBank. Hudson also directly benefited from the portions of the Jack Marshall loans from Tipton and Hammon that were used to make a payment on one of his loans at Peoples. Those loans are therefore attributable to him for lending limit purposes pursuant to 12 C.F.R. § 32.5(a)(1). At Tipton, the $20,000 advance to Respondent on December 29, 1986, when combined with Hudson's existing advances, first caused the line to exceed the bank's legal lending limit set forth at 12 U.S.C. § 84(a)(1). Total advances attributable to Hudson

equaled $533,020 at Tipton, which exceeded the lending limit by $437,509. At Hammon, the $60,000 advance to Hurley and the $90,000 advances to SKL and Respondent on December 31, 1986, when combined with Hudson's existing advances, first caused the line to exceed the bank's lending limit. Total advances attributable to Hudson equaled $502,020 at Hammon, which exceeded the lending limit by $407,792.

(20) The nominee loans at Tipton and Hammon are also attributable to Hudson for purposes of 12 U.S.C. § 375b, and 12 C.F.R. §§ 31.2(b) and 215.4(b), pursuant to 12 U.S.C. §§ 31.3 and 215.3(f). At Tipton, the loans to Clifford, Cypert, Lucas, Marshall, SKL and Tuck were made at a time when Hudson's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i). At Hammon, the loans to Cypert, Marshall, Matthews and Tuck were made at a time when Hudson's aggregate indebtedness exceeded five percent of capital and surplus, but did not receive prior board approval, in violation of 12 U.S.C. § 375b(2) and 12 C.F.R. §§ 31.2(b)(1) and 215.4(b)(1)(i).

(21) The violations set forth in paragraphs (19) and (20) above were uncorrected at the close of the May 31, 1987 examination of Tipton and the June 30, 1987 examination of Hammon. The violations resulted in losses of approximately $456,000 at Tipton and $437,000 at Hammon. The losses contributed to the banks' failures on September 3, 1987. Further details of the violations are specifically set forth in the Report of Supervisory Activity of Tipton dated May 31, 1987 (1987 Tipton ROSA) and the Report of Supervisory Activity of Hammon dated June 30, 1987 (1987 Hammon ROSA). The 1987 Tipton ROSA and 1987 Hammon ROSA are incorporated herein by reference the same as if fully set forth.

ARTICLE III

(1) The actions of Respondent described in Article II, paragraphs (1) through (21) above demonstrate that Respondent has committed violations of law and engaged in unsafe and unsound practices at Tipton and Hammon which resulted in substantial financial loss or other damage to the banks and serious prejudice to depositors' interests. The violations and practices involve personal dishonesty on Respondent's part and demonstrate a willful and continuing disregard for such banks' safety and soundness.

THEREFORE, Respondent is directed to file an answer in writing to the charges contained herein with the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219, within twenty (20) days from the date of service of this Notice, in accordance with 12 C.F.R. Part 19.

Pursuant to 12 U.S.C. § 1818(h)(1) and 12 C.F.R. § 19.10(c), the Comptroller may, in his discretion, order that a public hearing be held if he determines that it is necessary to protect the public interest. Respondent is hereby afforded an opportunity to submit his views as to whether a public hearing would be in the public interest in this case.

WITNESS, my hand on behalf of the Office of the Comptroller of the Currency, given at Washington, D.C. the 31st day of August, 1989.

/s/ Dean S. Marriott
DEAN S. MARRIOTT
Senior Deputy Comptroller
for Bank Supervision

APPENDIX L

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-89-05
AA-EC-89-117

IN THE MATTER OF JOHN HUDSON
FIRST NATIONAL BANK OF TIPTON (INSOLVENT)
TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON (INSOLVENT)
HAMMON, OKLAHOMA

STIPULATION AND CONSENT ORDER

WHEREAS, the Comptroller of the Currency of the United States of America (Comptroller) has initiated civil money penalty proceedings against John Hudson (Respondent) pursuant to 12 U.S.C. §§ 93(b), 504(c) through the issuance of a Notice of Assessment of a Civil Money Penalty (Notice), dated February 13, 1989; and

WHEREAS, the Comptroller has initiated prohibition proceedings against Respondent pursuant to 12 U.S.C. § 1818(e) (as amended) through the issuance of a Notice of Intention to Prohibit Further Participation (Prohibition Notice), dated August 31, 1989; and

WHEREAS, in the interest of cooperation and the avoidance of further proceedings with respect to the above matters, the Comptroller and Respondent wish to enter into this Stipulation and Consent Order;

NOW, THEREFORE, in consideration of the above premises, it is stipulated by and between the Comptroller,

through his duly authorized representative, and Respondent that:

ARTICLE I

(1) Respondent hereby consents to a civil money penalty the amount of sixteen thousand five hundred dollars ($16,500). Said penalty shall be payable in five installments, as follows: two thousand five hundred dollars ($2,500) upon Respondent's execution of this document, three thousand five hundred dollars ($3,500) within one year of Respondent's execution of this document, three thousand five hundred dollars ($3,500) within two years of Respondent's execution of this document, three thousand five hundred dollars ($3,500) within three years of Respondent's execution of this document, and three thousand five hundred dollars ($3,500) within four years of Respondent's execution of this document. Said penalty shall be payable to the Treasury of the United States and shall be delivered to the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219.

(2) In the event Respondent fails to make any payment within the periods stated in paragraph (1) above, Respondent will be given written notice that such payment is lacking. Respondent will then have ten days from his receipt of such written notice in which to tender payment. If payment is not tendered within that ten-day period, the entire unpaid balance of said penalty shall become due and payable immediately.

(3) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. §§ 93, 504, 1818(i) (as amended).

ARTICLE II

(1) With respect to the institutions and agencies set forth in paragraph (2) of this Article, Respondent hereby agrees that he shall not:

(a) participate in any manner in the conduct of their affairs;

(b) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights;

(c) vote for a director, or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u) (as amended); or

(d) violate any voting agreement previously approved by the "appropriate Federal banking agency," as defined in 12 U.S.C. § 1813(q) (as amended);

(2) The prohibitions in paragraph (1) of this Article apply to the following institutions and agencies:

(a) any insured depository institution, as defined in 12 U.S.C. § 1813(C);

(b) any institution treated as an insured bank under 12 U.S.C. § 1818(b)(3), (b)(4), or as a savings association under 12 U.S.C. § 1818(b)(8) (as amended);

(c) any insured credit union under the Federal Credit Union Act;

(d) any institution chartered under the Farm Credit Act of 1971;

(e) any appropriate Federal depository institution regulatory agency;

(f) the Federal Housing Finance Board and any Federal home loan bank;

(g) the Resolution Trust Corporaiton.

(3) The prohibitions of paragraphs (1) and (2) of this Article shall cease to apply with respect to a particular institution if Respondent obtains the prior written consent of both the Comptroller and the institution's "appropriate

Federal financial institutions regulatory agency," as defined in 12 U.S.C. § 1818(e)(7)(D) (as amended).

(4) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. § 1818(e), (i), (j), and (k) (as amended).

ARTICLE III

(1) Respondent hereby waives:

(a) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. §§ 93, 504, 1818 and 12 C.F.R. Part 19;

(b) all rights to seek judicial review of this Order;

(c) all rights in any way to contest the validity of this Order; and

(d) any and all claims for fees or expenses related to this Order against the Comptroller, or any of his agents, whether arising under common law or under the terms of any statute, including, but not limited to, the Equal access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412.

ARTICLE IV

(1) The Comptroller hereby agrees that this Stipulation and Consent Order does not constitute an admission of Respondent to any of the charges contained in either the Notice or the Prohibition Notice, nor shall any court of law construe it to constitute any such admission, nor shall any court of law use it as evidence of any such admission.

ARTICLE V

(1) The Comptroller hereby agrees that the execution of this Stipulation and Consent Order settles all claims the Comptroller may have against Respondent for violations

alleged in the Notice, Prohibition Notice, or any Report of Examination of the First National Bank of Tipton or the First National Bank of Hammon. The Comptroller also hereby agrees not to institute any additional enforcement actions against Respondent for the violations alleged in the Notice, Prohibition Notice, or any Report of Examination of the First National Bank of Tipton or the First National Bank of Hammon. Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.

IN TESTIMONY WHEREOF, the undersigned have hereunto set their hands.

Date 11-27-89 /s/ Robert J. Hermann
ROBERT J. HERMANN
Senior Deputy Comptroller
for Bank Supervision

Date 10-26-89 /s/ John Hudson
JOHN HUDSON

APPENDIX M

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-89-05
AA-EC-89-118

IN THE MATTER OF JACK RACKLEY
FIRST NATIONAL BANK OF TIPTON (INSOLVENT)
TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON (INSOLVENT)
HAMMON, OKLAHOMA

STIPULATION AND CONSENT ORDER

WHEREAS, the Comptroller of the Currency of the United States of America (Comptroller) has initiated civil money penalty proceedings against Jack Rackley (Respondent) pursuant to 12 U.S.C. §§ 93(b), 504(c) through the issuance of a Notice of Assessment of a Civil Money Penalty (Notice of Assessment), dated February 13, 1989; and

WHEREAS, the Comptroller has initiated prohibition proceedings against Respondent pursuant to 12 U.S.C. § 1818(e) (as amended) through the issuance of a Notice of Intention to Prohibit Further Participation (Prohibition Notice), dated August 31, 1989; and

WHEREAS, in the interest of cooperation and the avoidance of further proceedings with respect to the above matters, the Comptroller and Respondent wish to enter into this Stipulation and Consent Order;

NOW, THEREFORE, in consideration of the above premises, it is stipulated by and between the Comptroller, through his duly authorized representative, and Respondent that:

ARTICLE I

(1) Respondent hereby consents to a civil money penalty in the amount of twelve thousand five hundred dollars ($12,500). Said penalty shall be payable in four installments, as follows: two thousand five hundred dollars ($2,500) upon Respondent's execution of this document, three thousand three hundred thirty-three dollars ($3,333) within one year of Respondent's execution of this document, three thousand three hundred thirty-three dollars ($3,333) within two years of Respondent's execution of this document, and three thousand three hundred thirty-three ($3,333) within three years of Respondent's execution of this document. Said penalty shall be payable to the Treasury of the United States and shall be delivered to the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219.

(2) In the event Respondent fails to make any payment within the periods stated in paragraph (1) above, Respondent will be given written notice that such payment is lacking. Respondent will then have ten days from receipt of such written notice in which to tender payment. If payment is not tendered within that ten-day period, the entire unpaid balance of said penalty shall become due and payable immediately.

(3) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. §§ 93, 504, 1818(i) (as amended).

ARTICLE II

(1) With respect to the institutions and agencies set forth in paragraph (2) of this Article, Respondent hereby agrees that he shall not:

(a) participate in any manner in the conduct of their affairs;

(b) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights;

(c) vote for a director, or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u) (as amended); or

(d) violate any voting agreement previously approved by the "appropriate Federal banking agency," as defined in 12 U.S.C. § 1813(q) (as amended);

(2) The prohibitions in paragraph (1) of this Article apply to the following institutions and agencies:

(a) any insured depository institution, as defined in 12 U.S.C. § 1813(C);

(b) any institution treated as an insured bank under 12 U.S.C. § 1818(b)(3), (b)(4), or as a savings association under 12 U.S.C. § 1818(b)(8) (as amended);

(c) any insured credit union under the Federal Credit Union Act;

(d) any institution chartered under the Farm Credit Act of 1971;

(e) any appropriate Federal depository institution regulatory agency;

(f) the Federal Housing Finance Board and any Federal home loan bank; and

(g) the Resolution Trust Corporation.

(3) The prohibitions of paragraphs (1) and (2) of this Article shall cease to apply with respect to a particular institution if Respondent obtains the prior written consent of both the Comptroller and the institution's "appropriate Federal financial institutions regulatory agency," as defined in 12 U.S.C. § 1818(e)(7)(D) (as amended).

(4) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. § 1818(e), (i), (j), and (k) (as amended).

ARTICLE III

(1) Respondent hereby waives:

(a) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. §§ 93, 504, 1818 and 12 C.F.R. Part 19;

(b) all rights to seek judicial review of this Order;

(c) all rights in any way to contest the validity of this Order; and

(d) any and all claims for fees or expenses related to this Order against the Comptroller, or any of his agents, whether arising under common law or under the terms of any statute, including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412.

ARTICLE IV

(1) The Comptroller hereby agrees that the execution of this Stipulation and Consent Order settles all claims the Comptroller may have against Respondent for violations alleged in the Notice of Assessment and Prohibition Notice, and further agrees not to institute any additional enforcement actions against Respondent for the violations alleged in the Notice of Assessment and the Prohibition

Notice. Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.

IN TESTIMONY WHEREOF, the undersigned have hereunto set their hands.

/s/ Robert J. Herrman 11-27-89
ROBERT J. HERRMAN
Senior Deputy Comptroller
for Bank Supervision

/s/ Jack Rackley Oct. 25, 1989
JACK RACKLEY

APPENDIX N

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

AA-EC-89-05
AA-EC-89-116

IN THE MATTER OF LARRY BARESEL
FIRST NATIONAL BANK OF TIPTON (INSOLVENT)
TIPTON, OKLAHOMA
FIRST NATIONAL BANK OF HAMMON (INSOLVENT)
HAMMON, OKLAHOMA

STIPULATION AND CONSENT ORDER

WHEREAS, the Comptroller of the Currency of the United States of America (Comptroller) has initiated civil money penalty proceedings against Larry Baresel (Respondent) pursuant to 12 U.S.C. §§ 93(b), 504(c) through the issuance of a Notice of Assessment of a Civil Money Penalty (Notice of Assessment), dated February 13, 1989; and

WHEREAS, the Comptroller has initiated prohibition proceedings against Respondent pursuant to 12 U.S.C. § 1818(e) (as amended) through the issuance of a Notice of Intention to Prohibit Further Participation (Prohibition Notice), dated August 31, 1989; and

WHEREAS, in the interest of cooperation and the avoidance of further proceedings with respect to the above matters, the Comptroller and Respondent wish to enter into this Stipulation and Consent Order;

NOW, THEREFORE, in consideration of the above premises, it is stipulated by and between the Comptroller, through his duly authorized representative, and Respondent that:

ARTICLE I

(1) Respondent hereby consents to a civil money penalty in the amount of fifteen thousand dollars ($15,000). Said penalty shall be payable in four equal installments, as follows: three thousand seven hundred fifty dollars ($3,750) upon Respondent's execution of this document, three thousand seven hundred fifty dollars ($3,750) within one year of Respondent's execution of this document, three thousand seven hundred fifty dollars ($3,750) within two years of Respondent's execution of this document, and three thousand seven hundred fifty dollars ($3,750) within three years of Respondent's execution of this document. Said penalty shall be payable to the Treasury of the United States and shall be delivered to the Hearing Clerk, Office of the Chief Counsel, Office of the Comptroller of the Currency, Washington, D.C. 20219.

(2) In the event Respondent fails to make any payment within the periods stated in paragraph (1) above, Respondent will be given written notice that such payment is lacking. Respondent will then have ten days from receipt of such written notice in which to tender payment. If payment is not tendered within that ten-day period, the entire unpaid balance of said penalty shall become due and payable immediately.

(3) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. §§ 93, 504, 1818(i) (as amended).

ARTICLE II

(1) With respect to the institutions and agencies set forth in paragraph (2) of this Article, Respondent hereby agrees that he shall not:

(a) participate in any manner in the conduct of their affairs;

(b) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization wtih respect to any voting rights;

(c) vote for a director, or serve or act as an "institution-affiliated party," as defined in 12 U.S.C. § 1813(u) (as amended); or

(d) violate any voting agreement previously approved by the "appropriate Federal banking agency," as defined in 12 U.S.C. § 1813(q) (as amended);

(2) The prohibitions in paragraph (1) of this Article apply to the following institutions and agencies:

(a) any insured depository institution, as defined in 12 U.S.C. § 1813(C);

(b) any institution treated as an insured bank under 12 U.S.C. § 1818(b)(3), (b)(4), or as a savings association under 12 U.S.C. § 1818(b)(8) (as amended);

(c) any insured credit union under the Federal Credit Union Act;

(d) any institution chartered under the Farm Credit Act of 1971;

(e) any appropriate Federal depository institution regulatory agency;

(f) the Federal Housing Finance Board and any Federal home loan bank; and

(g) the Resolution Trust Corporation.

(3) The prohibitions of paragraphs (1) and (2) of this Article shall cease to apply with respect to a particular institution if Respondent obtains the prior written consent of both the Comptroller and the institution's "appropriate Federal financial institutions regulatory agency," as defined in 12 U.S.C. § 1818(e)(7)(D) (as amended).

(4) This Article of this Stipulation and Consent Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. § 1818(e), (i), (j), and (k) (as amended).

ARTICLE III

(1) Respondent hereby waives:

(a) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. §§ 93, 504, 1818 and 12 C.F.R. Part 19;

(b) all rights to seek judicial review of this Order;

(c) all rights in any way to contest the validity of this Order; and

(d) any and all claims for fees or expenses related to this Order against the Comptroller, or any of his agents, whether arising under common law or under the terms of any statute, including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412.

ARTICLE IV

(1) The Comptroller hereby agrees that this Stipulation and Consent Order does not constitute an admission of Respondent to any of the charges contained in either the Notice of Assessment or the Prohibition Notice, nor shall any court of law construe it to constitute any such admission, nor shall any court of law use it as evidence of any such admission.

ARTICLE V

(1) The Comptroller hereby agrees that the execution of this Stipulation and Consent Order settles all claims the Comptroller may have against Respondent for violations alleged in the Notice of Assessment and Prohibition Notice, and further agrees not to institute any additional enforcement actions against Respondent for the violations alleged in the Notice of Assessment and the Prohibition Notice. Respondent understands that nothing herein shall preclude any proceedings brought by the Comptroller to enforce the terms of this Stipulation and Consent, and that nothing herein constitutes, nor shall Respondent contend that it constitutes, a waiver of any right, power, or authority of any other representatives of the United States, or agencies thereof, to bring other actions deemed appropriate.

IN TESTIMONY WHEREOF, the undersigned have hereunto set their hands.

/s/ Robert J. Herrmann — Date 11-27-89
ROBERT J. HERMANN
Senior Deputy Comptroller
for Bank Supervision

/s/ Larry Baresel — Date 10/29/89
LARRY BARESEL

APPENDIX O

RELEVANT PROVISIONS OF THE UNITED STATES CODE

§ 93. Violations of provisions of chapter; forfeiture of franchise; personal liability of directors; civil money penalty

(a) If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this chapter, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper district or Territorial court of the United States in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

(b)(1) Any national banking association which violates, or any officer, director, employee, agent, or other person participating in the conduct of the affairs of such association who violates any of the provisions of this chapter, or any of the provisions of section 92a of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil money penalty of not more than $1,000 per day for each day during which such violation continues. The penalty may be assessed and collected by the Comptroller of the Currency by written notice. As used in the section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

(2) In determining the amount of the penalty the Comptroller shall take into account the appropriateness of the penalty with respect to the size of financial resources and good faith of the association or person charged, the gravity of the violation, the history of previous violations, and such other matters as justice may require.

(3) The association or person assessed shall be afforded an opportunity for agency hearing, upon request made within ten days after issuance of the notice of assessment. In such hearing all issues shall be determined on the record pursuant to section 554 of Title 5. The agency determination shall be made by final order which may be reviewed only as provided in paragraph (4). If no hearing is requested as herein provided, the assessment shall constitute a final and unappealable order.

(4) Any association or person against whom an order imposing a civil money penalty has been entered after agency hearing under this section may obtain review by the United States court of appeals for the circuit in which the home office of the bank is located, or in the United States Court of Appeals for the District of Columbia Circuit, by filing a notice of appeal in such court within thirty days from the date of such order, and simultaneously sending a copy of such notice by registered or certified mail to the Comptroller. The Comptroller shall promptly certify and file in such court the record upon which the penalty was imposed, as provided in section 2112 of Title 28. The findings of the Comptroller shall be set aside if found to be unsupported by substantial evidence as provided by section 706(2)(e) of Title 5.

(5) If any association or person fails to pay an assessment after it has become a final and unappealable order, or after the court of appeals has entered final judgment in favor of the agency, the Comptroller shall refer the matter to the Attorney General, who shall recover the amount assessed by action in the appropriate United

States district court. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review.

(6) The Comptroller may, in his discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under this section.

(7) The Comptroller shall promulgate regulations establishing procedures necessary to implement this subsection.

(8) All penalties collected under authority of this section shall be covered into the Treasury of the United States.

(R.S. § 5239; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Nov. 10, 1978, Pub. L. 95-630, Title I, § 103, 92 Stat. 3643; Oct. 15, 1982, Pub. L. 97-320, Title IV, § 424 (d)(3), (f), 96 Stat. 1523; Oct. 15, 1982, Pub. L. 97-320, Title IV, § 424(g), as amended Jan. 12, 1983, Pub. L. 97-457, § 24, 96 Stat. 2510.)

§ 375. Purchases from directors; sales to directors

Any member bank may contract for, or purchase from, any of its directors or from any firm of which any of its directors is a member, any securities or other property, when (and not otherwise) such purchase is made in the regular course of business upon terms not less favorable to the bank than those offered to others, or when such purchase is authorized by a majority of the board of directors not interested in the sale of such securities or property, such authority to be evidenced by the affirmative vote or written assent of such directors: *Provided, however*, That when any director, or firm of which any director is a member, acting for or on behalf of others, sells securities or other property to a member bank, the Board of Governors of the Federal Reserve System by regulation may, in any or all cases, require a full disclosure to be

made, on forms to be prescribed by it, of all commissions or other considerations received, and whenever such director or firm, acting in his or its own behalf, sells securities or other property to the bank the Board of Governors of the Federal Reserve System, by regulation, may require a full disclosure of all profit realized from such sale.

Any member bank may sell securities or other property to any of its directors, or to a firm of which any of its directors is a member, in the regular course of business on terms not more favorable to such director or firm than those offered to others, or when such sale is authorized by a majority of the board of directors of a member bank to be evidenced by their affirmative vote or written assent: *Provided, however*, That nothing in this section contained shall be construed as authorizing member banks to purchase or sell securities or other property which such banks are not otherwise authorized by law to purchase or sell.

(Dec. 23, 1913, c. 6, § 22(d), as added Sept. 26, 1918, c. 177, § 5, 40 Stat. 970, and amended Aug. 23, 1935, c. 614, § 203(a), 49 Stat. 704.)

§ 375a. Loans to executive officers of banks

(1) General prohibition; authorization for extension of credit; conditions for credit

Except as authorized under this section, no member bank may extend credit in any manner to any of its own executive officers. No executive officer of any member bank may become indebted to that member bank except by means of an extension of credit which the bank is authorized to make under this section. Any extension of credit under this section shall be promptly reported to the board of directors of the bank, and may be made only if—

(A) the bank would be authorized to make it to borrowers other than its officers;

(B) it is on terms not more favorable than those afforded other borrowers;

(C) the officer has submitted a detailed current financial statement; and

(D) it is on condition that it shall become due and payable on demand of the bank at any time when the officer is indebted to any other bank or banks on account of extensions of credit of any one of the three categories respectively referred to in paragraphs (2), (3), and (4) in an aggregate amount greater than the amount of credit of the same category that could be extended to him by the bank of which he is an officer.

* * * *

§ 503. Liability of directors and officers of member banks

If the directors or officers of any member bank shall knowingly violate or permit any of the agents, officers, or directors of any member bank to violate any of the provisions of sections 375, 375a, 375b, and 376 of this title or regulations of the board made under authority thereof, or any of the provisions of sections 212, 213, 214, 215, 655, 1005, 1014, 1906, or 1909 of Title 18, every director and officer participating in or assenting to such violation shall be held liable in his personal and individual capacity for all damages which the member bank, its shareholders, or any other persons shall have sustained in consequence of such violation.

(Dec. 23, 1913, c. 6, § 22(f), as added Sept. 26, 1918, c. 177, § 5, 40 Stat. 970, and amended Sept. 3, 1954, c. 1263, § 28, 68 Stat.1236.)

§ 504. Civil penalty

(a) Making loans, extensions of credit, purchases of securities, etc., respecting affiliates, executive officers, etc.

Any member bank which violates or any officer, director, employee, agent, or other person participating in the

conduct of the affairs of such member bank who violates any provision of section 371c, 375, 375a, 375b, 376, and 503 of this title, or any regulation issued pursuant thereto, shall forfeit and pay a civil penalty of not more than $1,000 per day for each day during which such violation continues: *Provided*, That the agency having authority to impose a civil money penalty may, in its discretion, compromise, modify, or remit any civil money penalty which is subject to imposition or has been imposed under such authority. The penalty may be assessed and collected by the Comptroller of the Currency in the case of a national bank, or the Board in the case of a State member bank, by written notice. As used in this section, the term "violates" includes without any limitation any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation.

* * * *

§ 1818. Termination of status as insured depository institution

(a) Termination of insurance

(1) Voluntary termination

Any insured depository institution which is not—

(A) a national member bank;

(B) a State member bank;

(C) a Federal branch;

(D) a Federal savings association; or

(E) an insured branch which is required to be insured under subsection (a) or (b) of section 3104 of this title,

may terminate such depository institution's status as an insured depository institution if such insured institution provides written notice to the Corporation

of the institution's intent to terminate such status not less than 90 days before the effective date of such termination.

(2) Involuntary termination

(A) Notice to primary regulator

If the Board of Directors determines that—

(i) an insured depository institution or the directors or trustees of an insured depository institution have engaged or are engaging in unsafe or unsound practices in conducting the business of the depository institution;

(ii) an insured depository institution is in an unsafe or unsound condition to continue operations as an insured institution; or

(iii) an insured depository institution or the directors or trustees of the insured institution have violated any applicable law, regulation, order, condition imposed in writing by the Corporation in connection with the approval of any application or other request by the insured depository institution, or written agreement entered into between the insured depository institution and the Corporation.

the Board of Directors shall notify the appropriate Federal banking agency with respect to such institution (if other than the Corporation) or the State banking supervisor of such institution (if the Corporation is the appropriate Federal banking agency) of the Board's determination and the facts and circumstances on which such determination is based for the purpose of securing the correction of such practice, condi-

tion, or violation. Such notice shall be given to the appropriate Federal banking ageny not less than 30 days before the notice required by subparagraph (B), except that this period for notice to the appropriate Federal banking agency may be reduced or eliminated with the agreement of such agency.

(B) Notice of intention to terminate insurance

If, after giving the notice required under subparagraph (A) with respect to an insured depository institution, the Board of Directors determines that any unsafe or unsound practice or condition or any violation specified in such notice requires the termination of the insured status of the insured depository institution, the Board shall—

(i) serve written notice to the insured depository institution of the Board's intention to terminate the insured status of the institution;

(ii) provide the insured depository institution with a statement of the charges on the basis of which the determination to terminate such instiution's insured status was made (or a copy of the notice under subparagraph (A)); and

(iii) notify the insured depository institution of the date (not less than 30 days after notice under this subpargraph) and place for a hearing before the Board of Directors (or any person designated by the Board) with respect to the termination of the institution's insured status.

(3) Hearing; termination

If, on the basis of the evidence presented at a hearing before the Board of Directors (or any person designated by the Board for such purpose), in

which all issues be determined on the record pursuant to section 554 of Title 5 and the written findings of the Board of Directors (or such person) with respect to such evidence (which shall be conclusive), the Board of Directors finds that any unsafe or unsound practice or condition or any violation specified in the notice to an insured depository institution under subparagraph (B) has been established, the Board of Directors may issue an order terminating the insured status of such depository institution effective as of a date subsequent to such finding.

(4) Appearance; consent to termination

Unless the depository institution shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the termination of its status as an insured depository institution and termination of such status thereupon may be ordered.

(5) Judicial review

Any insured depository institution whose insured status has been terminated by order of the Board of Directors under this subsection shall have the right of judicial review of such order only to the same extent as provided for the review of orders under subsection (h) of this section.

(6) Publication of notice of termination

The Corporation may publish notice of such termination and the depository institution shall give notice of such termination to each of its depositors at his last address of record on the books of the depository institution, in such manner and at such time as the Board of Directors may find to be necessary and may order for the protection of depositors.

(7) Temporary insurance of deposits insured as of termination

After the termination of the insured status of any depository institution under the provisions of this subsection, the insured deposits of each depositor in the depository institution on the date of such termination, less all subsequent withdrawals from any deposits of such depositor, shall continue for a period of at least 6 months or up to 2 years, within the discretion of the Board of Directors to be insured, and the depository institution shall continue to pay to the Corporation assessments as in the case of an insured depository institution during such period. No additions to any such deposits and no new deposits in such depository institution made after the date of such termination shall be insured by the Corporation, and the depository institution shall not advertise or hold itself out as having insured deposits unless in the same connection it shall also state with equal prominence that such additions to deposits and new deposits made after such date are not so insured. Such depository institution shall, in all other respects, be subject to the duties and obligations of an insured depository institution for the period [1] referred to in the 1st sentence from the date of such termination, and in the event that such depository institution shall be closed on account of inability to meet the demands of its depositors within such period, the Corporation shall have the same powers and rights with respect to such depository institution as in case of an insured depository institution.

(8) Temporary suspension of insurance

(A) In general

If the Board of Directors initiates a termination proceeding under paragraph (2), and the Board of Directors, after consultation with the appropriate Federal banking agency, finds that an insured depository institution (other than a savings association to which subparagraph (B)

[1] So in original.

applies) has no tangible capital under the capital guidelines or regulations of the appropriate Federal banking agency, the Corporation may issue a temporary order suspending deposit insurance on all deposits received by the institution.

(B) Special rule for certain savings institutions

(i) Certain goodwill included in tanglible capital

In determining the tangible capital of a savings association for purposes of this paragraph, the Board of Directors shall include goodwill to the extent it is considered a component of capital under section 1464 (t) of this title. Any savings association which would be subject to a suspension order under subparagraph (A) but for the operation of this subparagraph, shall be considered by the Corporation to be a "special supervisory association."

(ii) Suspension order

The Corporation may issue a temporary order suspending deposit insurance on all deposits received by a special supervisory association whenever the Board of Directors determines that—

(I) the capital of such association, as computed utilizing applicable accounting standards, has suffered a material decline;

(II) that such association (or its directors or officers) is engaging in an unsafe or unsound practice in conducting the business of the association;

(III) that such association is in an unsafe or unsound condition to continue operating as an insured association; or

(IV) that such association (or its directors or officers) has violated any applicable law, rule, regulation, or order, or any condition imposed in writing by a Federal banking agency, or any written agreement including a capital improvement plan entered into with any Federal banking agency, or that the association has failed to enter into a capital improvement plan which is acceptable to the Corporation within the time period set forth in section 1464(t) of this title.

Nothing in this paragraph limits the right of the Corporation or the Director of the Office of Thrift Supervision to enforce a contractual provision which authorizes the Corporation or the Director of the Office of Thrift Supervision, as a successor to the Federal Savings and Loan Insurance Corporation or the Federal Home Loan Bank Board, to require a savings association to write down or amortize goodwill at a faster rate than otherwise required under this chapter or under applicable accounting standards.

(C) Effective period of temporary order

Any order issued under subparagraph (A) shall become effective not earlier than 10 days from the date of service upon the institution and, unless set aside, limited, or suspended by a court in proceedings authorized hereunder, such temporary order shall remain effective and

enforceable until an order of the Board under paragraph (3) becomes final or until the Corporation dismisses the proceedings under paragraph (3).

(D) Judicial review

Before the close of the 10-day period beginning on the date any temporary order has been served upon an insured depository institution under subparagraph (A), such institution may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district in which the home office of the institution is located, for an injunction setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order, and such court shall have jurisdiction to issue such injunction.

(E) Continuation of insurance for prior deposits

The insured deposits of each depositor in such depository institution on the effective date of the order issued under this paragraph, minus all subsequent withdrawals from any deposits of such depositor, shall continue to be insured, subject to the administrative proceedings as provided in this chapter.

(F) Publication of order

The depository institution shall give notice of such order to each of its depositors in such manner and at such times as the Board of Directors may find to be necessary and may order for the protection of depositors.

(G) Notice by corporation

If the Corporation determines that the depository institution has not substantially complied

with the notice to depositors required by the Board of Directors, the Corporation may provide such notice in such manner as the Board of Directors may find to be necessary and appropriate.

(H) Lack of notice

Notwithstanding subparagraph (A), any deposit made after the effective date of a suspension order issued under this paragraph shall remain insured to the extent that the depositor establishes that—

(i) such deposit consists of additions made by automatic deposit the depositor was unable to prevent; or

(ii) such depositor did not have actual knowledge of the suspension of insurance.

(9) Final decisions to terminate insurance

Any decision by the Board of Directors to—

(A) issue a temporary order terminating deposit insurance; or

(B) issue a final order terminating deposit insurance (other than under subsection (p) or (q) of this section);

shall be made by the Board of Directors and may not be delegated.

(10) Low- to moderate-income housing lender

In making any determination regarding the termination of insurance of a solvent savings association, the Corporation may consider the extent of the association's low- to moderate-income housing loans.

(b) Cease-and-desist proceedings

(1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-

affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

(2) A cease-and-desist order shall become effective at the expiration of thirty days after the service of such order upon the depository institution or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections (c) through (s) and subsection (u) of this section shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956 [12 U.S.C.A. § 1841 et seq.], and to any organization organized and operated under section 25(a) of the Federal Reserve Act [12 U.S.C.A. § 611 et seq.] or operating under section 25 of the Federal Reserve Act [12 U.S.C.A. § 601 et seq.], in the same manner as they apply to a State member insured depository institution. Nothing in this subsection or in subsection (c) of this section shall authorize any Federal banking agency, other than the Board of Governors of the Federal Reserve System, to issue a notice of charges or cease-and-desist order against a bank holding company or any subsidiary thereof (other than a bank or subsidiary of that bank).

(4) This subsection and subsections (c), (d), (h), (i), (k), (*l*), (m), and (n) of this section shall apply to any foreign bank or company to which subsection (a) of section 3106 of this title applies and to any subsidiary (other than a bank) of any such foreign bank or company in the same manner as they apply to a bank holding company and any subsidiary thereof (other than a bank) under subparagraph (3) of this subsection. For the purposes of this paragraph, the term "subsidiary" shall have the meaning assigned to it in section 2 of the Bank Holding Company Act of 1956 [12 U.S.C.A. § 1841].

(5) This section shall apply, in the same manner as it applies to any insured depository institution for which the appropriate Federal banking agency is the Comptroller of the Currency, to any national banking association chartered by the Comptroller of the Currency, including an uninsured association.

(6) Affirmative action to correct conditions resulting from violations or practices. The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to—

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if—

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts; and

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

(F) take such other action as the banking agency determines to be appropriate.

(7) Authority to limit activities. The authority to issue an order under this subsection or subsection (c) of this section includes the authority to place limitations on the activities or functions of an insured depository institution or any institution-affiliated party.

(8) Expansion of authority to savings and loan affiliates and entities. Subsections (a) through (s) and subsection (u) of this section shall apply to any savings and loan holding company and to any subsidiary (other than a bank or subsidiary of that bank) of a savings and loan holding company, to any service corporation of a savings association and to any subsidiary of such service corporation, whether wholly or partly owned, in the same manner as such subsections apply to a savings association.

(c) Temporary cease-and-desist orders

(1) Whenever the appropriate Federal banking agency shall determine that the violation or threatened violation or the unsafe or unsound practice or practices, specified in the notice of charges served upon the depository institution or any institution-affiliated party pursuant to paragraph (1) of subsection (b) of this section, or the continuation thereof, is likely to cause insolvency or significant dissipation of assets or earnings of the depository institution, or is likely to weaken the condition of the depository institution or otherwise prejudice the interests of its depositors prior to the completion of the proceedings conducted pursuant to paragraph (1) of subsection (b) of this section, the agency may issue a temporary order requiring the depository institution or such party to cease and desist from any such violation or practice and to take affirmative action to prevent such insolvency, dissipation, condition, or prejudice pending completion of such proceedings. Such order may include any requirement authorized under subsection (b)(6)(B) of this section. Such order shall become effective upon service upon the depository institution or such institution-affiliated party and, unless set aside, limited, or suspended by a court in proceedings authorized by paragraph (2) of this subsec-

tion, shall remain effective and enforceable pending the completion of the administrative proceedings pursuant to such notice and until such time as the agency shall dismiss the charges specified in such notice, or if a cease-and-desist order is issued against the depository institution or such party, until the effective date of such order.

(2) Within ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for an injunction [2] setting aside, limiting, or suspending the enforcement, operation, or effectiveness of such order pending the completion of the administrative proceedings pursuant to the notice of charges served upon the depository institution or such party under paragraph (1) of subsection (b) of this section, and such court shall have jurisdiction to issue such injunction.

(3) Incomplete or inaccurate records

(A) Temporary order. If a notice of charges served under subsection (b)(1) of this section specifies, on the basis of particular facts and circumstances, that an insured depository institution's books and records are so incomplete or inaccurate that the appropriate Federal banking agency is unable, through the normal supervisory process, to determine the financial condition of that depository institution or the details or purpose of any transaction or transactions that may have a material effect on the financial condition of that depository institution, the agency may issue a temporary order requiring—

(i) the cessation of any activity or practice which gave rise, whether in whole or in part,

[2] So in original. Probably should be "injunction."

to the incomplete or inaccurate state of the books or records; or

(ii) affirmative action to restore such books or records to a complete and accurate state, until the completion of the proceedings under subsection (b)(1) of this section.

(B) Effective period. Any temporary order issued under subparagraph (A)—

(i) shall become effective upon service; and

(ii) unless set aside, limited, or suspended by a court in proceedings under paragraph (2), shall remain in effect and enforceable until the earlier of—

(I) the completion of the proceeding initiated under subsection (b)(1) of this section in connection with the notice of charges; or

(II) the date the appropriate Federal banking agency determines, by examination or otherwise, that the insured depository institution's books and records are accurate and reflect the financial condition of the depository institution.

(d) Temporary cease-and-desist orders; enforcement

In the case of violation or threatened violation of, or failure to obey, a temporary cease-and-desist order issued pursuant to paragraph (1) of subsection (c) of this section, the appropriate Federal banking agency may apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for an injunction to enforce such order, and, if the court shall determine that there has been such violation or threatened

violation or failure to obey, it shall be the duty of the court to issue such injunction.

(e) Removal and prohibition authority

(1) Authority to issue order. Whenever the appropriate Federal banking agency determines that—

(A) any institution-affiliated party has, directly or indirectly—

(i) violated—

(I) any law or regulation;

(II) any cease-and-desist order which has become final;

(III) any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or

(IV) any written agreement between such depository institution and such agency;

(ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)—

(i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, or breach—

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,

the agency may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

(2) Whenever, in the opinion of the appropriate Federal banking agency, any director or officer of an insured depository institution has committed any violation of the Depository Institution Management Interlocks Act [12 U.S.C.A. § 3201 et seq.], the agency may serve upon such director or officer a written notice of its intention to remove him from office.

(3) Suspension order

(A) Suspension or prohibition authorized. If the appropriate Federal banking agency serves written notice under paragraph (1) or (2) to any institution-affiliated party of such agency's intention to issue an order under such paragraph, the appropriate Federal banking agency may suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution, if the agency—

(i) determines that such action is necessary for the protection of the depository institution or the interests of the depository institution's depositors; and

(ii) serves such party with written notice of the suspension order.

(B) Effective period. Any suspension order issued under subparagraph (A)—

(i) shall become effective upon service; and

(ii) unless a court issues a stay of such order under subsection (f) of this section, shall remain in effect and enforceable until—

(I) the date the appropriate Federal banking agency dismisses the charges contained in the notice served under paragraph (1) or (2) with respect to such party; or

(II) the effective date of an order issued by the agency to such party under paragraph (1) or (2).

(C) Copy of order. If an appropriate Federal banking agency issues a suspension order under subparagraph (A) to any institution-affiliated party, the agency shall serve a copy of such order on any insured depository institution with which such party is associated at the time such order is issued.

(4) A notice of intention to remove an institution-affiliated party from office or to prohibit such party from participating in the conduct of the affairs of an insured depository institution, shall contain a statement of the facts constituting grounds therefor, and shall fix a time and place at which a hearing will be held thereon. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after the date of service of such notice, unless an earlier or a later date is set by

the agency at the request of (A) such party, and for good cause shown, or (B) the Attorney General of the United States. Unless such party shall appear at the hearing in person or by a duly authorized representative, such party shall be deemed to have consented to the issuance of an order of such removal or prohibition. In the event of such consent, or if upon the record made at any such hearing the agency shall find that any of the grounds specified in such notice have been estabilshed, the agency may issue such orders of suspension or removal from office, or prohibition from participation in the conduct of the affairs of the depository institution, as it may deem appropriate. In any action brought under this section by the Comptroller of the Currency in respect to any such party with respect to a national banking association or a District depository institution, the findings and conclusions of the Administrative Law Judge shall be certified to the Board of Governors of the Federal Reserve System for the determination of whether any order shall issue. Any such order shall become effective at the expiration of thirty days after service upon such depository institution and such party (except in the case of an order issued upon consent, which shall become effective at the time specified therein). Such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(5) For the purpose of enforcing any law, rule, regulation, or cease-and-desist order in connection with an interlocking relationship, the term "officer" within the term "institution-affiliated party" as used in this subsection means an employee or officer with management functions, and the term "director" within the term "institution-affiliated party" as used in this subsection includes an advisory or honorary director, a trustee of a depository institution under the control of trustees, or any person who has a representative or a nominee serving in any such capacity.

(6) Prohibition of certain activities. Any person subject to an order issued under this subsection shall not—

(A) participate in any manner in the conduct of the affairs of any institution or agency specified in paragraph (7)(A);

(B) solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in subparagraph (A);

(C) violate any voting agreement previously approved by the appropriate Federal banking agency; or

(D) vote for a director, or serve or act as an institution-affiliated party.

(7) Industrywide prohibition

(A) In general. Except as provided in subparagraph (B), any person who, pursuant to an order issued under this subsection or subsection (g) of this section, has been removed or suspended from office in an insured depository institution or prohibited from participating in the conduct of the affairs of an insured depository institution may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of—

(i) any insured depository institution;

(ii) any institution treated as an insured bank under subsection (b)(3) or (b)(4) of this section, or as a savings association under subsection (b)(8) of this section;

(iii) any insured credit union under the Federal Credit Union Act [12 U.S.C.A. § 1781 et seq.];

(iv) any institution chartered under the Farm Credit Act of 1971 [12 U.S.C.A. § 2001 et seq.];

(v) any appropriate Federal depository institution regulatory agency;

(vi) the Federal Housing Finance Board and any Federal home loan bank; and

(vii) the Resolution Trust Corporation.

(B) Exception if agency provides written consent. If, on or after the date an order is issued under this subsection which removes or suspends from office any institution-affiliated party or prohibits such party from participating in the conduct of the affairs of an insured depository institution, such party receives the written consent of—

(i) the agency that issued such order; and

(ii) the appropriate Federal financial institutions regulatory agency of the institution described in any clause of subparagraph (A) with respect to which such party proposes to become an institution-affiliated party,

subparagraph (A) shall, to the extent of such consent, cease to apply to such party with respect to the institution described in each written consent. Any agency that grants such a written consent shall report such action to the Corporation and publicly disclose such consent.

(C) Violation of paragraph treated as violation of order. Any violation of subparagraph (A) by any person who is subject to an order described in such subparagraph shall be treated as a violation of the order.

(D) Appropriate Federal financial institutions regulatory agency defined. For purposes of this para-

graph and subsection (j) of this section, the term "appropriate Federal financial institutions regulatory agency" means—

(i) the appropriate Federal banking agency, in the case of an insured depository institution;

(ii) the Farm Credit Administration, in the case of an institution chartered under the Farm Credit Act of 1971 [12 U.S.C.A. § 2001 et seq.];

(iii) the National Credit Union Administration Board, in the case of an insured credit union (as defined in section 101(7) of the Federal Credit Union Act [12 U.S.C.A. § 1752(7)]);

(iv) the Secretary of the Treasury, in the case of the Federal Housing Finance Board and any Federal home loan bank; and

(v) the Oversight Board, in the case of the Resolution Trust Corporation.

(E) Consultation between agencies. The agencies referred to in clauses (i) and (ii) of subparagraph (B) shall consult with each other before providing any written consent described in subparagraph (B).

(F) Applicability. This paragraph shall only apply to a person who is an individual, unless the appropriate Federal banking agency specifically finds that it should apply to a corporation, firm, or other business enterprise.

(f) Stay of suspension and/or prohibition of institution-affiliated party

Within ten days after any institution-affiliated party has been suspended from office and/or prohibited from participation in the conduct of the affairs of an insured depository institution under subsection (e)(3) of this section,

such party may apply to the United States district court for the judicial district in which the home office of the depository institution is located, or the United States District Court for the District of Columbia, for a stay of such suspension and/or prohibition pending the completion of the administrative proceedings pursuant to the notice served upon such party under subsection (e)(1) or (e)(2) of this section, and such court shall have jurisdiction to stay such suspension and/or prohibition.

(g) Suspension or removal of institution-affiliated party charged with felony

(1) Whenever any institution-affiliated party, is charged in any information, indictment, or complaint, with the commission of or participation in a crime involving dishonesty or breach of trust which is punishable by imprisonment for a term exceeding one year under State or Federal law, the appropriate Federal banking agency may, if continued service or participation by such party may pose a threat to the interests of the depository institution's depositors or may threaten to impair public confidence in the depository institution, by written notice served upon such party, suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution. A copy of such notice shall also be served upon the depository institution. Such suspension or prohibition shall remain in effect until such information, indictment, or complaint is finally disposed of or until terminated by the agency. In the event that a judgment of conviction or an agreement to enter a pre-trial diversion or other similar program is entered against such party, and at such time as such judgment is not subject to further appellate review, the agency may, if continued service or participation by such party may pose a threat to the interests of the depository institution's depositors or may threaten to impair public confidence in the depository institution, issue and

serve upon such party an order removing such party from office or prohibiting such party from further participation in any manner in the conduct of the affairs of the depository institution except with the consent of the appropriate agency. A copy of such order shall also be served upon such depository institution, whereupon such party (if a director or an officer) shall cease to be a director or officer of such depository institution. A finding of not guilty or other disposition of the charge shall not preclude the agency from thereafter instituting proceedings to remove such party from office or to prohibit further participation in depository institution affairs, pursuant to paragraph (1), (2), or (3) of subsection (e) of this section. Any notice of suspension or order of removal issued under this paragraph shall remain effective and outstanding until the completion of any hearing or appeal authorized under paragraph (3) hereof unless terminated by the agency.

(2) If at any time, because of the suspension of one or more directors pursuant to this section, there shall be on the board of directors of a national depository institution less than a quorum of directors not so suspended, all powers and functions vested in or exercisable by such board shall vest in and be exercisable by the director or directors on the board not so suspended, until such time as there shall be a quorum of the board of directors. In the event all of the directors of a national depository institution are suspended pursuant to this section, the Comptroller of the Currency shall appoint persons to serve temporarily as directors in their place and stead pending the termination of such suspensions, or until such time as those who have been suspended, cease to be directors of the depository institution and their respective successors take office.

(3) Within thirty days from service of any notice of suspension or order of removal issued pursuant to paragraph (1) of this subsection, the institution-affiliated party

concerned may request in writing an opportunity to appear before the agency to show that the continued service to or participation in the conduct of the affairs of the depository institution by such party does not, or is not likely to, pose a threat to the interests of the depository institution's depositors or threaten to impair public confidence in the depository institution. Upon receipt of any such request, the appropriate Federal banking agency shall fix a time (not more than thirty days after receipt of such request, unless extended at the request of such party) and place at which such party may appear, personally or through counsel, before one or more members of the agency or designated employees of the agency to submit written materials (or, at the discretion of the agency, oral testimony) and oral arguments. Within sixty days of such hearing, the agency shall notify such party whether the suspension or prohibition from participation in any manner in the conduct of the affairs of the depository institution will be continued, terminated, or otherwise modified, or whether the order removing such party from office or prohibiting such party from further participation in any manner in the conduct of the affairs of the depository institution will be rescinded or otherwise modified. Such notification shall contain a statement of the basis for the agency's decision, if adverse to such party. The Federal banking agencies are authorized to prescribe such rules as may be necessary to effectuate the purposes of this subsection.

(h) Hearings and judicial review

(1) Any hearing provided for in this section (other than the hearing provided for in subsection (g)(3) of this section) shall be held in the Federal judicial district or in the territory in which the home office of the depository institution is located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of Title 5. Such hearing shall be private, unless the appropriate Fed-

eral banking agency, in its discretion, after fully considering the views of the party afforded the hearing, determines that a public hearing is necessary to protect the public interest. After such hearing, and within ninety days after the appropriate Federal banking agency or Board of Governors of the Federal Reserve System has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection (h) of this section. Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the agency may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to any proceeding under paragraph (1) may obtain a review of any order served pursuant to paragraph (1) of this subsection (other than an order issued with the consent of the depository institution or the institution-affiliated party concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file

in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of Title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency.

(i) Jurisdiction and enforcement; civil money penalty

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory, within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(2) Civil money penalty

(A) First tier. Any insured depository institution which, and any institution-affiliated party who—

(i) violates any law or regulation;

(ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) of this section;

(iii) violates any condition imposed in writing by the appropriate Federal banking agency in connection with the grant of any application or other request by such depository institution; or

(iv) violates any written agreement between such depository institution and such agency.

shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(B) Second tier. Notwithstanding subparagraph (A), any insured depository institution which, and any institution-affiliated party who—

(i)(I) commits any violation described in any clause of subparagraph (A);

(II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; or

(III) breaches any fiduciary duty;

(ii) which violation, practice, or breach—

(I) is part of a pattern of misconduct;

(II) causes or is likely to cause more than a minimal loss to such depository institution; or

(III) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(C) Third tier. Notwithstanding subparagraphs (A) and (B), any insured depository institution which, and any institution-affiliated party who—

(i) knowingly—

(I) commits any violation described in any clause of subparagraph (A);

(II) engages in any unsafe or unsound practice in conducting the affairs of such depository institution; or

(III) breaches any fiduciary duty; and

(ii) knowingly or recklessly causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under subparagraph (D) for each day during which such violation, practice, or breach continues.

(D) Maximum amounts of penalties for any violation described in subparagraph (c). The maximum daily amount of any civil penalty which may be assessed pursuant to subparagraph (C) for any violation, practice, or breach described in such subparagraph is—

(i) in the case of any person other than an insured depository institution, an amount to not exceed $1,000,000; and

(ii) in the case of any insured depository institution, an amount not to exceed the lesser of—

(I) $1,000,000; or

(II) 1 percent of the total assets of such institution.

(E) Assessment

(i) Written notice. Any penalty imposed under subparagraph (A), (B), or (C) may be assessed and collected by the appropriate Federal banking agency by written notice.

(ii) Finality of assessment. If, with respect to any assessment under clause (i), a hearing is not requested pursuant to subparagraph (H) within the period of time allowed under such subparagraph, the assessment shall constitute a final and unappealable order.

(F) Authority to modify or remit penalty. Any appropriate Federal banking agency may compromise, modify, or remit any penalty which such agency may assess or had already assessed under subparagraph (A), (B), or (C).

(G) Mitigating factors. In determining the amount of any penalty imposed under subparagraph (A), (B), or (C), the appropriate agency shall take into account the appropriateness of the penalty with respect to—

(i) the size of financial resources and good faith of the insured depository institution or other person charged;

(ii) the gravity of the violation;

(iii) the history of previous violations; and

(iv) such other matters as justice may require.

(H) Hearing. The insured depository institution or other person against whom any penalty is assesesd under this paragraph shall be afforded an agency hearing if such institution or person submits a re-

quest for such hearing within 20 days after the issuance of the notice of assessment.

(I) Collection

(i) Referral. If any insured depository institution or other person fails to pay an assessment after any penalty assessed under this paragraph has become final, the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court.

(ii) Appropriateness of penalty not reviewable. In any civil action under clause (i), the validity and appropriateness of the penalty shall not be subject to review.

(J) Disbursement. All penalties collected under authority of this paragraph shall be deposited into the Treasury.

(K) Regulations. Each appropriate Federal banking agency shall prescribe regulations establishing such procedures as may be necessary to carry out this paragraph.

(3) Notice under this section after separation from service. The resignation, termination of employment or participation, or separation of an institution-affiliated party (including a separation caused by the closing of an insured depository institution) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice and proceed under this section against any such party, if such notice is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such depository institution (whether such date occurs before, on, or after August 9, 1989).

(j) Criminal penalty

Whoever, being subject to an order in effect under subsection (e) or (g) of this section, without the prior written approval of the appropriate Federal financial institutions regulatory agency, knowingly participates, directly or indirectly, in any manner, including by engaging in an activity specifically prohibited in such an order or in subsection (e)(6) of this section) in the conduct of the affairs of—

(1) any insured depository institution;

(2) any institution treated as an insured bank under subsection (b)(3) or (b)(4) of this section, or as a savings association under subsection (b)(8) of this section;

(3) any insured credit union (as defined in section 1752(7) of this title);

(4) any institution chartered under the Farm Credit Act of [12 U.S.C.A. § 2001 et seq.]; or

(5) the Resolution Trust Corporation.

shall be fined not more than $1,000,000, imprisoned for not more than 5 years, or both.

(k) Repealed. Pub.L. 101-73, Title IX, § 920(c), Aug. 9, 1989, 103 Stat. 488.

(*l*) Notice of service

Any service required or authorized to be made by the appropriate Federal banking agency under this section may be made by registered mail, or in such other manner reasonably calculated to give actual notice as the agency may by regulation or otherwise provide. Copies of any notice or order served by the agency upon any State depository institution or any institution-affiliated party, pursuant to the provisions of this section, shall also be sent to the appropriate State supervisory authority.

(m) Notice to State authorities

In connection with any proceeding under subsection (b), (c)(1), or (e) of this section involving an insured State bank or any institution-affiliated party, the appropriate State supervisory authority with notice of the agency's intent to institute such a proceeding and the grounds therefor. Unless within such time as the Federal banking agency deems appropriate in the light of the circumstances of the case (which time must be specified in the notice prescribed in the preceding sentence) satisfactory corrective action is effectuated by action of the State supervisory authority, the agency may proceed as provided in this section. No bank or other party who is the subject of any notice or order issued by the agency under this section shall have standing to raise the requirements of this subsection as ground for attacking the validity of any such notice or order.

(n) Ancillary provisions; subpena power, etc.

In the course of or in connection with any proceeding under this section, or in connection with any claim for insured deposits or any examination or investigation under section 1820(c) of this title, the agency conducting the proceeding, examination, or investigation or considering the claim for insured deposits, or any member or designated representative thereof, including any person designated to conduct any hearing under this section, shall have the power to administer oaths and affirmations, to take or cause to be taken depositions, and to issue, revoke, quash, or modify subpenas and subpenas duces tecum; and such agency is empowered to make rules and regulations with respect to any such proceedings, claims, examinations, or investigations. The attendance of witnesess and the production of documents provided for in this subsection may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place

where such proceeding is being conducted. Any such agency or any party to proceedings under this section may apply to the United States District Court for the District of Columbia, or the United States district court for the judicial district or the United States court in any territory in which such proceeding is being conducted, or where the witness resides or carries on business, for enforcement of any subpena or subpena duces tecum issued pursuant to this subsection, and such courts shall have jurisdiction and power to order and require compliance therewith. Witnesess subpenaed under this subsection shall be paid the same fees and mileage that are paid witnesses in the district courts of the United States. Any court having jurisdiction of any proceeding instituted under this section by an insured depository institution or a director or officer thereof, may allow to any such party such reasonable expenses and attorneys' fees as it deems just and proper; and such expenses and fees shall be paid by the depository institution or from its assets. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in such person's power to do so, in obedience to the subpoena of the appropriate Federal banking agency, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year or both.

(o) Termination of membership of State bank in Federal Reserve System

Whenever the insured status of a State member bank shall be terminated by action of the Board of Directors, the Board of Governors of the Federal Reserve System shall terminate its membership in the Federal Reserve System in accordance with the provisions of subchapter VIII of chapter 3 of this title, and whenever the insured status

of a national member bank shall be so terminated the Comptroller of the Currency shall appoint a receiver for the bank, which shall be the Corporation. Except as provided in subsection (b) of section 1814 of this title, whenever a member bank shall cease to be a member of the Federal Reserve System, its status as an insured depository institution shall, without notice or other action by the board of directors, terminate on the date the bank shall cease to be a member of the Federal Reserve System, with like effect as if its insured status had been terminated on said date by the board of directors after proceedings under subsection (a) of this section. Whenever the insured status of an insured Federal savings bank shall be terminated by action of the Board of Directors, the Director of the Office of Thrift Supervision shall appoint a receiver for the bank, which shall be the Corporation.

(p) Banking institutions not receiving deposits

Nothwithstanding any other provision of law, whenever the Board of Directors shall determine that an insured banking institution is not engaged in the business of receiving deposits, other than trust funds as herein defined, the Corporation shall notify the banking institution that its insured status will terminate at the expiration of the first full semiannual assessment period following such notice. A finding by the Board of Directors that a banking institution is not engaged in the business of receiving deposits, other than such trust funds, shall be conclusive. The Board of Directors shall prescribe the notice to be given by the banking institution of such termination and the Corporation may publish notice thereof. Upon the termination of the insured status of any such banking institution, its deposits shall thereupon cease to be insured and the banking institution shall thereafter be relieved of all future obligations to the Corporation, including the obligation to pay future assessments.

(q) Assumption of liabilities

Whenever the liabilities of an insured depository institution for deposits shall have been assumed by another insured depository institution or depository institutions, whether by way of merger, consolidation, or other statutory assumption, or pursuant to contract (1) the insured status of the depository institution whose liabilities are so assumed shall terminate on the date of receipt by the Corporation of satisfactory evidence of such assumption; (2) the separate insurance of all deposits so assumed shall terminate at the end of six months from the date such assumption takes effect or, in the case of any time deposit, the earliest maturity date after the six-month period. Where the deposits of an insured depository institution are assumed by a newly insured depository institution, the depository institution whose deposits are assumed shall not be required to pay any assessment upon the deposits which have been so assumed after the semiannual period in which the assumption takes effect.

(r) Action or proceeding against foreign bank; basis; removal of officer or other person; venue; service of process

(1) Except as otherwise specifically provided in this section, the provisions of this section shall be applied to foreign banks in accordance with this subsection.

(2) An act or practice outside the United States on the part of a foreign bank or any officer, director, employee, or agent therof [3] may not constitute the basis for any action by any officer or agency of the United States under this section, unless—

(A) such officer or agency alleges a belief that such act or practice has been, is, or is likely to be a cause of or carried on in connection with or in furtherance of an act or practice within any one or more States which, in and of itself, would constitute an ap-

[3] So in original. Probably should be "thereof".

propriate basis for action by a Federal officer or agency under this section; or

(B) the alleged act or practice is one which, if proven, would, in the judgment of the Board of Directors, adversely affect the insurance risk assumed by the Corporation.

(3) In any case in which any action or proceeding is brought pursuant to an allegation under paragraph (2) of this subsection for the suspension or removal of any officer, director, or other person associated with a foreign bank, and such person fails to appear promptly as a party to such action or proceeding and to comply with any effective order or judgment therein, any failure by the foreign bank to secure his removal from any office he holds in such bank and from any further participation in its affairs shall, in and of itself, constitute grounds for termination of the insurance of the deposits in any branch of the bank.

(4) Where the venue of any judicial or administrative proceeding under this section is to be determined by reference to the location of the home office of a bank, the venue of such a proceeding with respect to a foreign bank having one or more branches or agencies in not more than one judicial district or other relevant jurisdiction shall be within such jurisdiction. Where such a bank has branches or agencies in more than one such jurisdiction, the venue shall be in the jurisdiction within which the branch or branches or agency or agencies involved in the proceeding are located, and if there is more than one such jurisdiction, the venue shall be proper in any such jurisdiction in which the proceeding is brought or to which it may appropriately be transferred.

(5) Any service required or authorized to be made on a foreign bank may be made on any branch or agency located within any State, but if such service is in connec-

tion with an action or proceeding involving one or more branches or one or more agencies located in any State, service shall be made on at least one branch or agency so involved.

(s) Compliance with monetary transaction recordkeeping and report requirements

(1) Compliance procedures required

Each appropriate Federal banking agency shall prescribe regulations requiring insured depository institutions to establish and maintain procedures reasonably designed to assure and monitor the compliance of such depository institutions with the requirements of subchapter II of chapter 53 of Title 31.

(2) Examination of bank to include review of compliance procedures

(A) In general

Each examination of an insured depository institution by the appropriate Federal banking agency shall include a review of the procedures required to be established and maintained under paragraph (1).

(B) Exam report requirement

The report of examination shall describe any problem with the procedures maintained by the insured depository institution.

(3) Order to comply with requirements

If the appropriate Federal banking agency determines that an insured depository institution—

(A) has failed to establish and maintain the procedures described in paragraph (1); or

(B) has failed to correct any problem with the procedures maintained by such depository

institution which was previously reported to the depository institution by such agency,

the agency shall issue an order in the manner prescribed in subsection (b) or (c) of this section requiring such depository institution to cease and desist from its violation of this subsection or regulations prescribed under this subsection.

(t) Authority of Board to take enforcement action against savings associations

(1) Authority to recommend that Director of Office of Thrift Supervision take enforcement action

The Corporation, based on an examination of a savings association by the Corporation or by the Director of the Office of Thrift Supervision or on other information, may recommend that the Director take any enforcement action authorized under section 1817(j) of this title, this section, or section 1828(j) of this title with respect to any savings association.

(2) Authority of Board to order corporation to take enforcement action if Director of Office of Thrift Supervision fails to follow recommendation

If the Director fails to take the recommended action or to provide an acceptable plan for addressing the concerns of the Corporation as set forth in its recommendation before the close of the 60-day period beginning on the date of the receipt of the formal recommendation from the Corporation, the Board of Directors may order the Corporation to take such action if the Board determines that—

(A) the association is in an unsafe or unsound condition; or

(B) failure to take the recommended action will result in continuance of unsafe or unsound

practices in conducting the business of the savings association.

(3) Effect of exigent circumstances

(A) Authority to act

Notwithstanding paragraphs (1) and (2), the Board of Directors may order the Corporation to exercise its authority, without regard to the time period set forth, in exigent circumstances after notifying the Director.

(B) Agreement on exigent circumstances

The Corporation shall, by agreement with the Director, set forth those exigent circumstances in which the Corporation may act without regard to the time period set forth above.

(4) Requests for formal actions and investigations

(A) Submission of requests

The regional offices of the Office of Thrift Supervision shall concurrently submit all requests for formal investigations or enforcement actions to both the Director and the Corporation.

(B) Director required to report on requests

The Director shall report semiannually to the Corporation the status or disposition of all such requests, including the reasons for the Director's decision to either approve or deny all such requests.

(5) Nondelegation

Any decisions by the Board of Directors to order actions described in this subsection shall not be delegated.

(u) Public disclosure of final orders

(1) In general

The appropriate Federal banking agency shall publish and make available to the public—

(A) any final order issued with respect to any administrative enforcement proceeding initiated by such agency under this section or any other provision of law; and

(B) any modification to or termination of any final order described in subparagraph (A) of this paragraph.

(2) Delay of publication under exceptional circumstances

If the appropriate Federal banking agency makes a determination in writing that the publication of any final order pursuant to paragraph (1) would seriously threaten the safety or soundness of an insured depository institution, such agency may delay the publication of such order for a reasonable time.

(Sept. 21, 1950, c. 967, § 2[8], 64 Stat. 879; Oct. 16, 1966, Pub. L. 89-695, Title II, §§ 202, 204, 80 Stat. 1046, 1054; Oct. 28, 1974, Pub. L. 93-495, Title I, § 110, 88 Stat. 1506; Sept. 17, 1978, Pub. L. 95-369, §§ 6(c)(14), (15), 11, 92 Stat. 618, 624; Nov. 10, 1978, Pub. L. 95-630, Title I, §§ 107(a)(1), (b), (c)(1), (d)(1), (e)(1), 111(a), Title II, § 208(a), Title III, §§ 303, 304, 92 Stat. 3649, 3653, 3654, 3656, 3660, 3665, 3674, 3676; Oct. 15, 1982, Pub.L. 97-320, Title I, § 113(g), (h), Title IV, §§ 404(c), 424(c), (d)(6), (e), 425(b), (c), 427(d), 433(a), 96 Stat. 1473, 1474, 1512, 1523-1527; Oct. 27, 1986, PubL. 99-570, Title I, § 1359(a), 100 Stat. 3207-27; Aug. 9, 1989, Pub.L. 101-73, Title II, § 201(a)(1), (b), Title IX, §§ 901(b)(1), (d), 902(a), 903(a), 904(a), 905(a), 906(a), 907(a), 908(a), 912, 913(a), 920(a), (c), 926, 103 Stat. 187, 188, 447, 450, 453, 457, 459, 462, 477, 482, 483, 488, 489.)

§ 1824. Treasury loans for insurance purposes; amount; rate of interest; public debt transactions; employment of funds for Bank Insurance Fund or Savings Association Insurance Fund

The Corporation is authorized to borrow from the Treasury, and the Secretary of the Treasury is authorized and directed to loan to the Corporation on such terms as may be fixed by the Corporation and the Secretary, such funds as in the judgment of the Board of Directors of the Corporation are from time to time required for insurance purposes, not exceeding in the aggregate $5,000,000,000 outstanding at any one time, subject to the approval of the Secretary of the Treasury: *Provided,* That the rate of interest to be charged in connection with any loan made pursuant to this section shall not be less than an amount determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities. For such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds of the sale of any securities hereafter issued under chapter 31 of Title 31, and the purposes for which securities may be issued under chapter 31 of Title 31, are extended to include such loans. Any such loan shall be used by the Corporation solely in carrying out its functions with respect to such insurance. All loans and repayments under this section shall be treated as public-debt transactions of the United States. The Corporation may employ such funds for purposes of the Bank Insurance Fund or the Savings Association Insurance Fund and the borrowing shall become a liability of each such fund to the extent funds are employed therefor. There are hereby appropriated to the Secretary, for fiscal year 1989 and each fiscal year thereafter, such sums as may be necessary to carry out this section.

(Sept. 21, 1950, c. 967, § 2[14], 64 Stat. 890; Aug. 9, 1989, Pub.L. 101-73, Title II, § 218, 103 Stat. 261.)

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against hte United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

(June 25, 1948, c. 645, 62 Stat. 701; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(L), 108 Stat. 2147.)

§ 372. Conspiracy to impede or injure officer

If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined not more than $5,000 or imprisoned not more than six years, or both.

(June 25, 1948, c. 645, 62 Stat. 701.)

§ 373. Solicitation to commit a crime of violence

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

(b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

(Added Pub.L. 98-473, Title II § 1003(a), Oct. 12, 1984, 98 Stat. 2138, and amended Pub.L. 99-646, § 26, Nov. 10, 1986, 100 Stat. 3597; Pub.L. 103-322, Title XXXIII, § 330016(2)(A), Sept. 13, 1994, 108 Stat. 2148.)

§ 655. Theft by bank examiner

Whoever, being a bank examiner or assistant examiner, steals, or unlawfully takes, or unlawfully conceals any money, note, draft, bond, or security or any other property of value in the possession of any bank or banking institution which is a member of the Federal Reserve System, which is insured by the Federal Deposit Insurance Corporation which is a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or which is an organization operating under section 25 or section 25(a) of the Federal Reserve Act, or from any safe deposit box in or adjacent to the premises of such bank, branch, agency, or organization, shall be fined under this title or imprisoned not more than five years, or both; but if the amount taken or concealed does not exceed $100, he shall be fined under this title or imprisoned not more than one year, or both; and shall be disqualified from holding office as a national bank examiner or Federal Deposit Insurance Corporation examiner.

This section shall apply to all public examiners and assistant examiners who examine member banks of the Federal Reserve System, banks the deposits of which are insured by the Federal Deposit Insurance Corporation, branches or agencies of foreign banks (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or organizations operating under section 25 or section 25(a) of the Federal Reserve Act, whether appointed by the Comptroller of the Currency, by the Board of Governors of the Federal Reserve System, by a Federal Reserve Agent, by a Federal Reserve bank, or by the Federal Deposit Insurance Corporation, or appointed or elected under the laws of any State; but shall not apply to private examiners or assistant examiners employed only by a clearing-house association or by the directors of a bank.

(June 25, 1948, c. 645, 62 Stat. 728; Nov. 29, 1990, Pub.L. 101-647, Title XXV, § 2597(e), 104 Stat. 4909; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(H), (K), 108 Stat. 2147.)

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act,[1] or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization, or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both: but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined under this title or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3 of the Federal Deposit Insurance Act; and the term "branch or agency of a foreign bank" means a branch or agency described in section 20(9) of this title.

[1] So in original.

(June 25, 1948, c. 645, 62 Stat. 729; Aug. 9, 1989, Pub.L. 101-73. Title IX, § 961(b), 103 Stat. 499; Nov. 29, 1990, Pub.L. 101-647, Title XXV, §§ 2504(b), 2595(a)(1), 2597(f), 104 Stat. 4861, 4906, 4909; Sept. 13, 1994, Pub.L. 103-322., Title XXXIII § (3300161)(H), 108 Stat. 2147.)

§ 657. Lending, credit and insurance institutions

Whoever, being an officer, agent or employee of or connected in any capacity with the Federal Deposit Insurance Corporation, National Credit Union Administration, Office of Thrift Supervision, the Resolution Trust Corporation, any Federal home loan bank, the Federal Housing Finance Board. Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development Administration or the Farm Credit System Insurance Corporation, a Farm Credit Bank, a bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution, other than an insured bank (as defined in section 656), the accounts of which are insured by the Federal Deposit Insurance Corporation or by the National Credit Union Administration Board or any small business investment company, or any community development financial institution receiving financial assistance under the Riegle Community Development and Regulatory Improvement Act of 1994, and whoever, being a receiver of any such institution, or agent or employee of the receiver,

embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined under this title or imprisoned not more than one year, or both.

(June 25, 1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139, § 11, 63 Stat. 90; July 28, 1956, c. 773, § 1, 70 Stat. 714; Aug. 21, 1958, Pub.L. 85-699, Title VII, § 703, 72 Stat. 698; Oct. 4, 1961, Pub.L. 87-353, § 3(q), 75 Stat. 774; May 25, 1967, Pub.L. 90-19, § 24(a), 81 Stat. 27; Oct. 19, 1970, Pub.L. 91-468, § 4, 84 Stat. 1016; Aug. 9, 1989, Pub.L. 101-73, Title IX, §§ 961(c), 962(a)(7), (8)(A), 103 Stat. 499, 502; Nov. 28, 1990, Pub.L. 101-624, Title XXIII, § 2303(e), 104 Stat. 3981; Nov. 29, 1990, Pub.L. 101-647, Title XVI, § 1603, Title XXV, §§ 2504(c), 2595(a)(2), 104 Stat. 4843, 4861, 4907; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, §§ 330004(6), 330016(1)(H), 108 Stat. 2141, 2147; Sept. 23, 1994, Pub.L. 103-325, Title I, § 119(c), 108 Stat. 2188.)

§ 1003. Demands against the United States

Whoever knowingly and fraudulently demands or endeavors to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, wages, gratuity, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority, or instrument, shall be fined under this title or imprisoned not more than five years, or both; but if the sum or value so obtained or attempted to be obtained does not exceed $100, he shall be fined under this title or imprisoned not more than one year, or both.

(June 25, 1948, c. 645, 62 Stat. 749; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(H), (L), 108 Stat. 2147.)

§ 1004. Certification of checks

Whoever, being an officer, director, agent, or employee of any Federal Reserve bank, member bank of the Federal Reserve System, insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act), branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or organization operating under section 25 or section 25(a) of the Federal Reserve Act, certifies a check before the amount thereof has been regularly deposited in the bank, branch, agency, or organization, by the drawer thereof, or resorts to any device, or receives any fictitious obligation, directly or collaterally, in order to evade any of the provisions of law relating to certification of checks, shall be fined under this title or imprisoned not more than five years, or both.

(June 25, 1948, c. 645, 62 Stat. 749; Nov. 29, 1990, Pub.L. 101-647, Title XXV, § 2597(g), 104 Stat. 4910; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, §330016(1)(K), 108 Stat. 2147.)

§ 1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, without authority from the directors of such bank, branch, agency, or organization or company, issues or puts in circulation any notes of such bank, branch, agency, or organization or company; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank, company, branch, agency, or organization with intent to injure or defraud such bank, company, branch, agency, or organization, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, company, branch, agency, or organization, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, company, branch, agency, or organization, or the Board of Governors of the Federal Reserve System;

Whoever with intent to defraud the United States or any agency thereof, or any financial institution referred to in this section, participates or shares in or receives (directly or indirectly) any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such financial institution—

Shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation; and the term "branch or agency of a foreign bank" means a branch or agency described in

section 20(9) of this title. For purposes of this section, the term "depository institution holding company" has the meaning given such term in section 3(w)(1) of the Federal Deposit Insurance Act.

(June 25, 1948, c. 645, 62 Stat. 750; Aug. 9, 1989, Pub.L. 101-73, Title IX, § 961(d), 103 Stat. 499; Nov. 29, 1990, Pub.L. 101-647, Title XXV, §§ 2504(d), 2595(a)(3), 2597(h), 104 Stat. 4861, 4907, 4910.)